Supreme Court, U.S.
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No. 09-71

IN THE

Supreme Court of the United States

JOAN E. JACKSON,

Petitioner,

v.

*THE HONORABLE JOHN MCHUGH,
SECRETARY OF THE ARMY,
[THE HONORABLE PETER GEREN,
SECRETARY OF THE ARMY,]

Respondent,

v.

BRIANNA SKINNER-HARRIS,

Movant.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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* Sept. 21, 2009 Appointment.

QUESTIONS PRESENTED

I. To avoid financial liability for undisclosed public health risk to deployed citizens, may the respondent's actions, to permanently preclude a government scientist's infectious diseases pathology research disclosure in peer-reviewed science journals and before medical research professional societies, be upheld under the First Amendment?

II. To avoid a research grant agreement financial obligation predicated on the research author-inventor's grant affiliation, may the respondent exercise copyright-like ownership against the plain meaning of 17 U.S.C. § 105 to administratively reassign research authorship to a non-author not grant affiliated; and, thereby, to create fictitious research records in support of replacement of the actual inventor with "administratively assigned inventor," who cannot in fact meet 35 U.S.C. § 102(a),(f) requirements to be named inventor; i.e. executive agency actions, if upheld as valid, may redefine in practice statutory inventor from "inventor first to conceive" to "inventor by executive reassignment"?

III. May the respondent, to achieve objectives of I and II, take actions adverse to petitioner against the teaching of *Burlington Northern v. White*, 548 U.S. 53, 67-68 (2006) holding the anti-retaliation provision protects an individual from retaliation that produces injury/harm sufficient to dissuade a reasonable person in the petitioner's position from making or supporting a charge of discrimination?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the list identifies all of the parties appearing here and in the court below.

The Petitioner is Joan Elise Jackson, a United States citizen, and former "tenured" federal government civil service employee [GS14/08], PhD Senior Research Scientist/Laboratory Director/ Program Manager, employed more than 25 years by the Walter Reed Army Institute of Research, hereinafter "WRAIR," Silver Spring, Maryland.

The Respondents are The Honorable Secretary of the Army, John McHugh [as of Sept. 21, 2009], prior, The Honorable Peter Geren, Secretary of the Army; and Brianna Skinner-Harris, Movant, a military officer formerly assigned to Walter Reed Army Institute of Research, Silver Spring, Maryland.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations. However, as noted in corporate disclosure in the court below, respondent's avoided research grant agreement [*see*, Appendix B] regarding intellectual property on which petitioner and others are named, may reach certain third party inventors and a trust established for science and medical infrastructure support in West and Central Africa.

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Petitioner Joan Elise Jackson respectfully petitions for a writ of certiorari for the judgment of the United States Court of Appeals for the Fourth Circuit for the District of Maryland in this case.

OPINION BELOW

The Fourth Circuit denial of rehearing *en banc* was [998130117-21] filed on July 21, 2009. The court of appeals (App. 09-1081) opinion is unpublished and reported at 325 Fed. Appx. 213, 2009 WL 1324666 (4th Cir. (Md.)) filed May 13, 2009. The opinions of the district court (No. 8:07-cv-00851-AW) are unpublished (Dist. Ct. Dkt. 61) entered on November 14, 2008 and (Dist. Ct. Dkt. 13) entered March 26, 2008. Order on motions was issued May 20, 2008. Dist. Ct. Dkt. 24. Pt. Appendix A.

Notice of intent to file writ for certiorari with certificate of service of notice was mailed to the Court of Appeals and mailed to the named parties overnight delivery signature required on July 30, 2009.

Petitioner submitted a petition for writ of certiorari mailed on 19 October 2009. The Clerk of the Court on October 27, 2009, returned the petition with instructions to resubmit this petition in correct format within 60 days.

JURISDICTION

The Court of Appeals for the Fourth Circuit, having jurisdiction by 28 U.S.C. § 1291, denied *en banc* rehearing, affirming without opinion, on July 21, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); by the U.S. Constitution, art. III, § 2, cl. 1-2.

CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL LAW PROVISIONS

The relevant constitutional and statutory law provisions are set forth in the Appendix C.

REASONS FOR GRANTING THE PETITION

This case presents three important factual questions having no clear consensus in among the Federal Circuits which if resolved would have significant impact on public health policy, and clarification of limits of executive agency action under the First Amendment and under Title VII, of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* The balance, between safeguarding the public's right to receive critical information and the protection of those government employees who engage in disclosure of such information versus governmental interest in nondisclosure, currently divides the Circuits based on where this balance is deemed met.

The Sixth, Seventh and Ninth Circuits seem in general to adopt a broad approach to both employee free speech and Title VII retaliation actions

where the government act is weighed for "likely to chill exercise of belief and association by the public employee."[1] The Fifth, Eighth, and Eleventh Circuits, while agreeing that First Amendment and Title VII claims extend beyond ultimate employment actions such as e.g. hiring, termination, demotion, reprimand, differ by limiting adverse action to that materially effecting conditions or terms of employment, that is a "material disadvantage" standard.[2]

The concern is that the latter narrow standard would sanction most government employer retaliation short of ultimate acts, restricting in fact the public's right to receive critical information about their government from public employees who have cause to know it and are dissuaded from disclosing such information. Application of the narrow protection standard may be viewed as an unbalance against the public's benefit by substantially inhibiting vigorous public debate of controversial government policy. Instead of debate to improve executive function, such restricted protection weighs to favor benefit to *immediate* and often short-term executive agency objectives or policy even when such executive prohibition against controversial information is contrary to public welfare.

First Amendment and Title VII retaliation protections are inextricably intertwined for federal employees simply because the mechanism for agen-

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[1] *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990).

[2] *Jones v. Fitzgerald*, 285 F.3d 705, 713 (8th Cir. 2002).

cy disclosure control inevitably runs to employment actions.

STATEMENT

The Court Of Appeals' Decision Fully Resolved Several Issues, Each Of Which Is Appropriate For Certiorari, And Its Resolution Is Inconsistent With The Decisions Of This Court And Other Circuits.

i. **The Court of Appeals, affirming the district court, erroneously decided that respondent's actions were made in good faith instead of medical liability and research contractual avoidance.**

ii. **The Court of Appeals erroneous failure to view a loss of almost half a scientist's research career achievement taken with publication (republication 2007) of unsubstantiated felony allegations and of baseless defamation of mental function for professional ability as absence of material harm.**

Petitioner was employed at Walter Reed Army Institute of Research for 27 years, first as a Visiting Scientist, then for >23 years as senior civilian government service PhD research scientist, Laboratory Director/Program Manger [GS14/08].

During every year of government service for which a job rating was done, about 25 annual ratings, petitioner's job performance was rated topmost achievable. Dist. Ct. Dkt. 11, at page 11.

During her entire professional career from 1970 until 2006, about 35 years, petitioner's research focused on the tropical disease complex, leishmaniases, infecting humans and warm-blooded animals, and having in several infection forms, disease analogies to HIV-AIDS. Exhibit 3, Dist. Ct. Dkt. 11. *See also*, Appendix D. Petitioner's primary research mandate was the discovery of new, more effective and less toxic alternatives to the >60-year-old-intravenous drug therapies used to treat leishmanial infections of humans. Petitioner is lead inventor or co-inventor on 20 patents/patent applications, most of which are new drugs or drug screening inventions applicable to leishmaniases, other tropical infectious diseases, and fungi. Exhibit 5, Dist. Ct. Dkt. 11.

Petitioner has published numerous articles, book chapters and given invited papers on her research overseas in Brazil, Italy, Austria, Nigeria, and Cameroon for various international organizations including the International Atomic Energy Agency, the World Health Organization and Pan American Health Organization. Petitioner also reviewed grants of other investigators for science merit at the request of the National Institutes of Health and the Science Commission for the European Union Communities. Petitioner was Deputy Director of Walter Reed Army Institute of Research's Tropical Medicine Course for U.S. Army physicians; and adjunct graduate faculty at the Uniformed Services University of the Health Sciences, F. Edward Herbert Medical School, Bethesda, Maryland, teaching clinical parasitology for about 15 years. Exhibits 3-4, Dist. Ct. Dkt. 11.

Petitioner also served as manuscript peer-reviewer for American Journal of Tropical Medicine and Hygiene; on science research committees of the American Society of Parasitology; and as Executive Committee Member-, Corresponding Secretary-Treasurer- (managing all the Society's business accounts and filing the tax returns) and President-elect of the Helminthological Society of Washington. Petitioner served as adjunct graduate-advisor for Masters and PhD candidates (four of whom were PhD candidates at the University of Calcutta, Calcutta, India) and as laboratory sponsor of many high school science student summer interns. *Id.* Petitioner routinely supervised between one to four civilian technical and professional staff.

In her entire > 35 year professional career no person, ever filed a complaint or grievance against her or implied petitioner was dishonest or mentally impaired outside her two Title VII actions.

For the reasons herein given and against her wishes, petitioner is presently not employed as a senior research scientist being early retired on 30 September 2006.

I. **To avoid financial liability for undisclosed public health risk to deployed citizens, may the respondent's actions to permanently preclude a government scientist's infectious diseases pathology research disclosure in peer-reviewed science journals and before professional medical research scientific societies be upheld under the First Amendment as constitutional?**

A. *How is retaliation recognized?*

While public employees historically were considered to have relinquished First Amendment protection in exchange for government employment, the modern trend is that although there may be some restraints, freedom of speech and association are generally held protected.[3] Protections recognized have included employee disclosures "to any person" of abuse of authority, and danger to public health and safety. In particular, disclosures of good faith dangers or risks to the public are generally protected, in many cases irrespective of balancing an employee's interest in First Amendment protections against accommodation of the needs of government.[4]

In *Bailey v. Kirk* claims of harassment of police chief by suspensions and demotion survived summary judgment, despite absence of property or

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[3] *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968).

[4] *See generally*, Isadore Silver, Public Employee Discharge and Discipline 1011-1090 (Aspen Publishers, Inc. 2005).

liberty interest and fairness of hearing reviewing various disciplinary sections. 777 F.2d 567 (10th Cir. 1985). Demotion, reduction in salary and responsibilities, and repeated queries as to whether an employee would resign were sufficient, since the demotion was a "harbinger of dismissal."[5] Here, petitioner's military supervisor for almost one year repeatedly requested that the petitioner "find something else to do for a job as of September 30, 2002" (or words to that effect).

B. ***Petitioner's dog protocol CO02-00 research permanently denied her disclosure included both pathology and new drug proof of efficacy. The facts and circumstances immediate to animal protocol violation allegations follow.***

Here, like *Mauzy* and *Tennyson*, petitioner was replaced by a younger male military officer who *within 8 days* (October 23, 2002, new supervisor's appointment; petitioner's removal, October 31, 2002) removed her as "unqualified" to remain a

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[5] *Mauzy v. Kelly Servs. Inc.*, 664 N.E.2d 1272, 1281 (Ohio 1996) ("[a] transfer accompanied by measurable compensation at a comparable level does not necessarily preclude a finding of constructive discharge"; evidence of outstanding performance and employer desire for younger employees, adverse employment actions, sham transfer to position eventually unfilled sufficient to withstand summary judgment.). *See also, Tennyson v. School District of Menomonie Area*, 606 N.W.2d 594, 603 (Wis. 1999) (holding where an employer's written policy guarantees its employees they will not be discharged without cause, and employee resigned believing investigation into her claims was neither far nor unbiased, a constructive discharge may be found.)

Laboratory Director which she had been with outstanding (topmost achievable) job performance consistently for 20 years,[6] and had achieved in January 2001 College of American Pathology and Clinical Laboratory Improvement Act of 1988, CAP:CLIA certification "with distinction," *the first laboratory of its kind so certified, for Leishmania Diagnosis, in the U.S.A.*

Thereafter petitioner's new supervisor, LTC Peter Joseph Weina, repeatedly in numerous emails and orally warned that petitioner's laboratory research (now, in his lab not hers) would end within about a year on September 30, 2002, so she should find something else to do. Within 6 months of the "termination date" specified by this new supervisor, LTC Peter Joseph Weina, filed against petitioner a reprimand on April 1, 2002 (alleging patent felony ethics bribery, 18 U.S.C. §§ 208-209),[7] misuse of $60,000 research funds, loss/theft of government equipment valued about >$30,000 for which she would be personally liable (found in LTC Weina's personal locked office), animal protocol violation charges August 29, 2002 (alleging mental impairment, solely on his unlicensed judgment, such that petitioner was a "freakin' liar" and could not distinguish truth from lie and, thus, should no longer be allowed to work as a research scientist,

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[6] Petitioner was a laboratory director of a leishmaniasis research laboratory at Walter Reed from October 1, 1979 to October 31, 20001. She was Laboratory Director of the Leishmania Diagnosis Laboratory furnishing diagnostic support for leishmaniasis detection in humans for Walter Reed Army Hospital from about August 6, 1995 to October 31, 2001.

[7] Exhibit 28, Dist Ct. Dkt. 11.

arguable defamation), notice of proposed suspension September 18, 2002, absent without leave October 2, 2002, notice of suspension October 15, 2002 and October 23, 2002, finally ending in his "taking" petitioner's 32 protocol dogs and >$105,000 science merit awarded research funds for his own distinct research use.

Another military officer, CPT Brianna Skinner, was allegedly "told to place her name" where petitioner's had been as author, on petitioner's dog protocol CO02-00 (>100 single spaced typed pages, approved November 2000 by both Walter Reed and National Institutes of Health) >15 years petitioner's research justifying the protocol.[8] CPT Skinner also testified she was told likewise to delete all leishmaniasis pathology data, *mandated by the approved dog protocol CO02-00*, showing neurologic infection of the outer membrane (dura mater) and blood capillary network (choroid plexus) of the dogs' brains (with associated spontaneous, intermittent behavior change-marked withdrawal, or aggression), adrenal (with lethargy, lack of stamina), sex organs (both sexes), increased predisposition to cancers of many types (infection-associated immunodepression), and transmission of the infection to offspring (miscarriages, stillbirths, neonatal death due to inability to nurse, etc.).[9]

The petitioner's protocol CO02-00 dogs had been infected in nature, and donated by their pri-

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[8] Exhibit 24, Dist. Ct. Dkt. 55.

[9] Exhibit 26, Dist. Ct. Dkt. 55; Appendix E (three pages therefrom).

vate owners for her research, as the canine infection can not be cured by older existing drug therapies and is almost invariably fatal. The dogs came from various states over the U.S.A. so each had to be diagnosed (using the same process as CDC, Walter Reed, and a Reference Lab in Rome. Italy for human diagnosis), i.e. by leishmanial isolation from dog's tissue and the cultured parasites typed for identification. All leishmanial infected CO02-00 dogs were infected with one of the most common strains infecting both humans and dogs in southern Europe, the Mediterranean basin, Middle East, and Asia. The leishmanial parasites from CO02-00 dogs were identified by three laboratories including the U.S. Centers for Diseases Control and Prevention, CDC, Atlanta, Georgia, and the World Health Organization Reference Laboratory, Public Health Service, Rome, Italy. It was highly unusual to have an opportunity to study long-term chronic leishmanial infections in dogs (most lab studies use acute laboratory infected animals). Petitioner was concerned at her pathologic findings because the tissues' damage was not limited to one or two animals but common to a majority of the untreated dogs before she started them on the experimental antileishmanial drug therapy per the CO02-00 protocol.[10]

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[10] Dog protocol CO02-00 is Exhibit 24, Dist. Ct. Dkt. 55.

C. *What is the link of petitioner's dog research to public health risk for deployed?*

The Middle East and Asia are areas the World Health Organization designated as "epidemic" for leishmaniases. See, Appendix D. The military published that from January 2003 to November 2004 "there were 1,178 incident diagnoses of leishmaniasis among members of the U.S. Armed Forces."[11]

For example, in June 1998 a U.S. soldier, Arvid Brown, who had been deployed to Saudi Arabia during the first Gulf War, had his blood sample sent to Walter Reed for diagnosis of suspected leishmaniasis. It was not sent to the *Leishmania* Diagnosis Laboratory, but rather to a serology laboratory distinct from petitioner's lab. The sample tested negative for leishmaniasis. However, testing by a civilian laboratory showed the patient, Mr. Brown, his wife and two children (both born subsequent to his deployment) all tested positive for leishmanial infection.

According to his case, initially filed in 2004, Mr. Brown suffers physical and mental impairments so that he no longer meets the minimum physical and mental standards for the U.S. Army Reserve. His wife died of liver cancer, and his chil-

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[11] Jenny C. Lay, *Leishmaniasis among U.S. Armed Forces, January 2003-November 2004*, Medical Surveillance Monthly Report, 10(6), 2 (2004).

dren both suffer some mental disability.[12] These pathologic manifestations and the sexual transmission between partners and to offspring were the very pathologic manifestations CPT Brianna Skinner was allegedly ordered in 2002-early 2003 to delete from petitioner's dog protocol CO02-00 results, retaining only the new drug testing results showing the experimental drugs worked to cure the first two dogs treated.

Petitioner's July 2002 report in naturally infected dogs recapitulates the Browns' alleged pathologic injuries from leishmaniasis.[13]

Petitioner has been permanently denied publication of any of her dog protocol CO02-00 research executed March 2000-August 2002. *See*, Appendix E. The part of the study done with CDC exactly as the precluded research was published by CDC absent Walter Reed's clearance (albeit Walter Reed after publication granted clearance). This publication on which petitioner was coauthor won two science excellence awards in 2007.[14]

Further, CPT Skinner's senior supervisor, COL Patricia Nossov, was granted clearance by the

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[12] *See, e.g. Brown v. United States*, 451 F.3d 411, 416 (6th Cir. 2006) (holding a post-discharge 1994 examination [for leishmaniases infection] arguably created a new duty to warn). *See also, Brown v. United States*, 583 F.3d 916 6th Cir. 2009). Demand is $125,000,000,000.00. *See* Appendix D.

[13] Appendix E, three pages from Exhibit 26, Dist. Ct. Dkt. 55. Appendix D, 2 pages from Exhibit 10, Dist. Ct. Dkt. 25. *See also*, Appendices F-I.

[14] Exhibit 10, Dist. Ct. Dkt. 60.

Walter Reed attorney in early 2003 to publish petitioner's dog protocol CO02-00 research as COL Nossov's own research.[15] Respondent argued that petitioner's dog protocol was "too corrupt" to publish, when in fact it appears "cleansed" simply by placing a military officer's name on the publication. Petitioner argues the only reason for the latter is that COL Nossov would have published petitioner's research absent the pathology, which if disclosed would likely be cited as evidence the military knew of the potential serious health risk untreated leishmaniasis may pose to deployed infected soldiers and their families. Given the size of the demand in the Brown's case and the increasing numbers of troops infected in Iraq and Afghanistan was and remains medical liability the military would chose to foreclose by denying petitioner's disclosure against public health policy.

Petitioner respectfully asserts that all retaliatory acts by respondent were immediately coincident with Petitioner's ongoing protected actions, e.g. reports to Congress and Inspector General (IG) testimony (latter at Senator Paul Sarbanes' request)[16] re deployed health risk foreclosed

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[15] Exhibit 2, Dist. Ct. Dkt. 55.

[16] Petitioner corresponded with her Congressional representatives, the Honorable Senator Barbara A. Mikulsi and the Honorable Paul Sarbanes, from October 2002-February 2006 regarding her public health concerns regarding the respondent's leishmaniasis program and risk it posed to public health of deployed (Quest. Presented 1), about 27 letters entered into evidence. Dist. Ct. docket doc #55, Ex. 13-14. Senator Sarbanes initiated an Inspector General investigation ongoing from about March 2003-February 2006.

Petitioner's disclosure in peer-reviewed scientific journals; and immediately coincident with Title VII participation and testimony, thus, should be reasonably interpreted in light of the all the facts and circumstances as impermissible retaliation in violation of public policy.[17]

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[17] Exhibits 13-14, Dist Ct. Dkt. 55.

II. To avoid a research grant agreement material financial obligation predicated on the research author-inventor's grant affiliation, may the respondent exercise copyright-like ownership against the plain meaning of 17 U.S.C. § 105 to administratively re-assign research authorship to non-author not grant affiliated; and, thereby, to create fictitious research records in support of replacement of the actual inventor with "administratively assigned inventor," who can not in fact meet 35 U.S.C. § 102(a),(f) requirements to be named inventor; i.e. executive agency actions, if upheld as valid, may redefine in practice statutory inventor from "inventor first to conceive" to "inventor by executive agency re-assignment"?

A. *The grant agreement at issue re new drugs proven effective by Petitioner's dog protocol, CO02-00, provided 70% license and royalties to named inventors and an African trust, while retaining only 30% to Walter Reed Army Institute of Research. Appendix B.*

Petitioner's dog drug testing protocol, CO02-00, support was initially awarded to Petitioner as a $75,000 supplement to a >$5,000,000/10 year, 1994-2004, international research "program project grant."[18]

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[18] Exhibit 1, Dist. Ct. Dkt. 18; and Exhibit 23, Dist. Ct. Dkt. 55.

The objective of the grant was to identify, purify, conduct preclinical (non-human) tests, necessary to bring to commercial market purified compounds isolated from traditional medicine herbs used to treat various infectious diseases in West and Central Africa. The grant sub-program project grant of which petitioner was Associate Program Director, focused on herbs used to treat parasitic and fungal infections. Petitioner's grant research focus was discovery of new therapies for leishmaniases.

This National Institutes of Health or NIH, grant program, the International Cooperative Biodiversity Group, or ICBG, was unique in that to receive funding, the sponsoring institution, Walter Reed Army Institute of Research or WRAIR, must execute an express agreement stating that in perpetuity (the agreement survived the duration of the grant) to receive the >$5,000,000 in ICBG research funds for 10 years, Walter Reed, WRAIR, had to agree patent license and royalties fees of drugs developed under the ICBG 70%, 15-20% to the named inventors [agreement p. 4, para. 4.03.1] and 50% [agreement p.5, para. 4.03.2] to the trust for West and Central Africa, while retaining only 30% [agreement p. 5, para. 4.03.3] for WRAIR in perpetuity [agreement p. 8, para. 8.04].[19]

The agreement also provided that copyright "in works of the parties shall be protected by use of copyright notices, where appropriate." [agreement, p. 5, para. 4.08]. These provisions of the agreement

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[19] Exhibit 6, Dist. Ct. Dkt. 60; and Exhibit 3, Dist. Ct. Dkt. 25; reproduced in Appendix B.

for the ICBG grant pertained to petitioner's dog protocol, CO02-00 new antileishmanials testing initially funded and approved by the ICBG program officials to whom research results of the protocol were regularly reported. *See* agreement, Exhibit 6, Dist. Ct. Dkt. 60; and Exhibit 3, Dist. Ct. Dkt. 25, relevant sections reproduced in Appendix B.

B. *Financial objective for reassignment of petitioner's protocol CO02-00 research is arguable science misconduct.*

Replacement of petitioner, a civilian ICBG *grant-affiliated* patents lead inventor-author, on Petitioner's dog protocol, CO02-00, and Petitioner's reports showing proof of new antileishmanials' efficacy, with a military officer, CPT Brianna Skinner [now, LCDR Brianna Skinner-Harris], *who was never affiliated with the ICBG grant*, would in all likelihood create "believable," albeit "fictitious," and thereby fraudulent, paper records to replace [wrongly] petitioner also on the respective drug patents to avoid WRAIR's 70% loss of antileishmanial license and royalties mandated by the ICBG benefits sharing agreement.[20]

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[20] Exhibit 6, Dist. Ct. Dkt. 60.

C. *Timeline for petitioner's protocol CO02-00 research reassignment [wrongly] as the work of CPT Brianna Skinner, nexus with Title VII (two cases litigated continuously from Nov. 2000 to Present, Dec. 2009) and communications with Congressional representatives Oct. 2002-Feb. 2006 (about 27 letters back and forth, with IG investigation).*

Petitioner reported to NIH the first two "cures" in two dogs using the new ICBG-developed drugs under protocol CO02-00 on 1 July 2002. Exhibit 6, Dist. Ct. Dkt. 55 contains a copy of the *signed and dated* report by petitioner and *countersigned and dated June 31, 2002 [July 1, 2002] by NIH Program Officer*, Dr. Joshua Rosenthal. Respondent became aware of petitioner's report either on July 1, 2002 or about 14-15 August 2002 when petitioner presented her same research in an oral presentation at the Institute.

As noted in part I herein, on or about 28 August 2002 petitioner filed notice to the Institute Animal Care and Use Committee, IACUC, Amendment #5, a written request and associated proofs of certification of adequate animal license certifications and housing for the dogs from Cornell, to move her 32 CO02-00 research dogs to Cornell Veterinary College, Ithaca, NY. On August 29, 2002, *within 24 hours of her filing to leave Walter Reed* to continue her research at Cornell, petitioner was charged with numerous protocol violations by her military supervisor, LTC Peter Joseph Weina, against whom her Title VII complaint was then be-

ing litigated, with trial anticipated within a couple of months.

Petitioner would have been able to improve her drugs patents within a year or two at Cornell and, thereby, WRAIR would have lost the value of petitioner's existing patents assigned to Walter Reed, because under the Bayh-Dole Act, 35 U.S.C. §§ 200-212, Cornell University, not Walter Reed, would have acquired ownership all subsequent patents' while petitioner worked at Cornell. Further, were petitioner to improve the antileishmanials formulation and administration schedule, Walter Reed's existing patent No. 6,403,576 B1 (issued in part from provisional serial no. 60/097,672 filed August 24, 1998) on which petitioner is author and lead inventor, would have been of substantial less value having been superceded by improved patented therapies assigned to Cornell.[21]

Petitioner respectfully argues, Walter Reed took the adverse actions to bring bogus animal protocol violations allegations against her both in Title VII retaliation and against protections of the First Amendment, because petition's court date was in August 2002 pending in a matter of weeks to further defame her, to avoid loss of the new proven effective (already FDA-approved) antileishmanials' patents value, to create an excuse to preclude her publications of the pathology data important for deployed, and to avoid the benefits sharing agreement to which petitioner's protocol CO0200 research was subject mandating Walter Reed's loss of

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[21] Exhibit 4, Dist. Ct. Dkt. 18, and Exhibit 25, Dist. Ct. Dkt, 55.

70% license and royalties from the new antileishmanials. Both ended petitioner's career, "taking" her >15 year research science achievement by misattribution and misappropriation and by precluding petitioner's employment at Cornell by threatening her new employer, Professor Steve Barr, Cornell College of Veterinary Medicine, to bring dog protocol charges against him as well to end his career, were he to persist in hiring Petitioner to continue her research in collaboration with Dr. Barr.[22]

Professor Barr told petitioner LTC Weina *threatened to end Professor's Barr's professional career as LTC Weina had ended petitioner's career, by making animal protocol violations charges against Professor Barr* were Professor Barr to persist to hire petitioner to continue her dog drug testing research at Cornell.[23] This latter may be viewed as a prohibited form of post-employment interference for which respondent employers have been found liable in retaliation.[24]

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[22] Exhibits 27 and 29, Dist. Ct. Dkt. 55. *See also*, Exhibits, Dist. Ct. Dkt. 11, 18, 20, 25, 50, 55, 60, incorporated by reference.

[23] Exhibit 27, Dist Ct. Dkt. 55.

[24] *See*, e.g. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that the anti-retaliation includes former employees.) Similarly the employer was held liable for "blackballing" former employees to their new employers in *Ford v. Rigidply Rafters, Inc.*, 984 F.Supp. 386 (D. Md. 1997) (allegation the former employee was "suit happy" resulting in award of back pay.); *EEOC v. Metzger*, 824 F. Supp. 1 (D.D.C. 1993) (holding respondent employer liable when respondent employer informed new employer of employee's former EEO suit, resulting in bad treatment thereafter by new employer.);

D. *Respondent's Actions To Replace Petitioner on Petitioner's Research Maybe Considered to be Science Misconduct*

Were the respondent's action complained of by petitioner either to sound only in copyright or, alternatively, sound only in simple plagiarism· science misconduct Petitioner argues that the copyright standards for originality, i.e. absence of plagiarism, are also logically appropriate standards for plagiarism for determining science misconduct. *Feist Publications, Inc. v. Rural Telephone Service, Co., Inc.*, 499 U.S. 340 (1991) and *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) teach against replacing petitioner with CPT Brianna Skinner on petitioner's dog protocol CO02·00 and refiled·censored CO02·00 results to delete pathology relevant to health risk of deployed in research new drug progress reports.

In *Feist* the court held "the *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author." *Feist*, 945 F.2d at 359·360. *Childress* teaches that "(1) for purposes of the Copyright Act's definition of 'joint work,' contribution of each joint author must be copyrightable; (2) in order for joint authorship to exist, each putative author must intend, at the time the contribution of each was created, that they would be treated as joint authors; and (3) where

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Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997) (holding disclosure to new employer that an employee had met with an EEO counselor was an unlawful act of retaliation even if the employee was rejected in the new job due to reasons unrelated to her having filed a job bias complaint.)

there was no evidence from which it could be inferred that playwright [plaintiff] ever shared actress' [defendant] notion that they were coauthors of play, actress' claim of coauthorship was properly rejected." *Childress*, 945 F.2d at 500.

Here, CPT/now, LCDR Brianna Skinner-Harris testified,[25] and it is affirmed also by timeline that petitioner's protocol as written was administratively terminated 30 September 2002 about two months before CPT Skinner took control of the protocol CO02-00 dogs, i.e. she neither executed as Principal Investigator, nor wrote one word of petitioner's >100 page protocol CO02-00, nor gave even one dog one dose of any experimental drugs designed for testing by said protocol using the protocol procedures, the latter also confirmed in daily signed and dated entries within the 32 dogs' veterinary records showing cessation of experimental protocol drugs' administration for every dog on or shortly prior to Sept. 30, 2002.

Rather, CPT Skinner testified under oath on September 27, 2008 (Exhibit 1 at Tr. 8:1-25-9:1-6, 11:2-14, Dist. Ct. Dkt. 55) she merely replaced another veterinarian on the protocol about late May 2002 to oversee the general health care of the dogs for about 4 months of a Petitioner's protocol CO02-00 ongoing for about 21 months, from November 2000-August 2002. Thus, CPT Skinner's work associated with petitioner's dog protocol was not of the nature and scope deemed a conceptual contribution that could stand alone as a research publication, re the *Childress* standard for originality and

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[25] Exhibit 1, Dist. Ct. Dkt. 55.

contribution warranting joint authorship; there was no agreement with petitioner for joint authorship absent any such conceptual contribution by CPT Skinner, nor had there been any such with the veterinarian CPT Skinner replaced. *Childress*, 945 F.2d at 500.

The policies and criteria for research authorship generally followed by most research institutions including Walter Reed are reiterated in an email from COL Russell E. Coleman for his subordinate staff's compliance.[26] This latter is compliant with the research science ethics policy training provided by the Office of the Staff Judge Advocate, U.S. Army Medical Research and Material Command to Walter Reed research scientists on science misconduct;[27] e.g. a powerpoint presentation of attorney, Stephen Maleson.

Here, CPT Brianna Skinner's and her supervisor COL Patricia Nossov's, [wrongful] claims to authorship of all petitioner's dog protocol CO02-00 and results, are arguably *noncompliant* with the plain meaning *both of institute practice and the executive agency regulatory policy and guidelines.* Respondent cites no legal authority for the "taking," arguable misappropriation by plagiarism and data falsification in fraud.

Petitioner respectfully asks the court to put the respondent to his proof, as naked assertions of "purported law" or "purported executive agency reg-

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[26] Exhibit 13, Dist. Ct. Dkt.18.

[27] Exhibit 3, Dist. Ct. Dkt. 55.

ulation" should not be permitted to stand in evidence against published regulation and guidelines. Further evidence of retaliation, is respondent's answer to petitioner's interrogatory #4; therein respondent admits there is *no scientist but petitioner* who ever had his or her research reassigned as the work of another based on animal protocol violations charges in the history of Walter Reed.[28]

Petitioner respectfully asserts respondent can not successfully argue law or policy because respondent's actions by CPT Brianna Skinner are precluded by both; and if such existed would drastically alter both copyright and patent law if applied in practice to science research. Respondent's defense to retaliation must therefore fail to knowing and intentional harm. Therefore, lower courts' findings to the contrary may logically be viewed as plain error.

The definitions of plagiarism and falsification for science misconduct for Walter Reed, according to Mr. Maleson, Esq., are those of the Public Health Service Policies on Research Misconduct; Final Rule, 42 C.F.R. §§50 and 93, (May 17, 2005). The 42 C.F.R. §93.103 Research Misconduct provides:

> Research misconduct means the fabrication, falsification, or plagiarism in proposing, performing or reviewing research, or in reporting research results.

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[28] Exhibit 8, page 5, Dist. Ct. Dkt. 55.

> (a) Fabrication is making up data or results and recording or reporting them.
>
> (b) Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.
>
> (c) Plagiarism is the appropriation of another's ideas, processes, results, or words without giving proper credit.
>
> (d) Research misconduct does not include honest error or differences of opinion.

CPT Brianna Skinner, "replacing her name in fraud where Petitioner's had been" on petitioner's > 100 page protocol CO02-00 representing petitioner's >15 years of prior research, meets the definition of §93.103(c) "plagiarism," and misappropriation either of which or both are deemed via §93.103 "science misconduct." *Id.*

Plagiarism for science misconduct may reasonably be determined by applying the substantial similarity and the amount of copying test used to determine copyright infringement. 2 The Law of Copyright § 14:24 Unauthorized copying of a work's expression is a determination of "substantial similarity" between the two works even when the copying is intentional. *Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498 (2d Cir. 1982). However, even the existence of great numbers of dissimilarities between the works will not excuse infringement. 2 The Law of Copyright § 14:24.

LCDR Skinner-Harris admitted under oath Sept. 27, 2009 at least 3 times she changed not one word of petitioner's >100 page protocol, nor wrote the results and accomplishments sections copying verbatim petitioner's sections filed nine months previous, but merely deleted all reference to leishmaniasis pathology and refiled those reports as her own by signature.[29] Judge Learned Hand stated, "[n]o plagiarist can excuse the wrong by showing how much of his work he did not pirate."[30]

Here, the professional harm done in retaliation to petitioner by misappropriation of her >15 years research and final new drugs' breakthrough is a circumstance no "reasonable scientist" may overcome by future hard work. Absent reversal, this "taking" ends petitioner's research science career. Fifteen years research loss showing finally a new drug breakthrough, even considered alone ab-

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[29] Exhibit 1 Dist. Ct. Dkt. 55, Deposition Sept. 27, 2008 of Brianna Skinner-Harris; Ex. 1, pp. 1-3; 10:19-22 & 36:23-25 & 38:4-11 & 76:17-24 [movant admits she never wrote one word of protocol CO02-00]; 39:2-23 & 46:12-24 [movant admits she copied Petitioner's dog protocol CO02-00 new drug research reports progress, achievement and data interpretive sections verbatim]; 50:6-13 [movant admits COL Patricia Nossov was her "senior supervisor"]; 61:9-15 [movant admits she took samples for PCR diagnostic testing]; 67:24-25 thru 69:25 and 76:25 thru 77:1 [movant admits she never sought nor received any grant money funding protocol CO02-00 at any time]; 90-91 [List of [Deposition] Exhibits]; 92 [Certificate of Reporter].

[30] *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936). *See also, Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970) (holding infringement of copyright is not confined to exact reproductions but includes colorable alterations made to disguise piracy.)

sent any other acts of retaliation against petitioner, is for most scientists about 25%-50% of their entire employment careers.

The respondent's defense simply fails any test to justify these disparate acts against petitioner as necessary to legitimate business practice. Walter Reed actually paid more money to retaliate than were respondent simply to have let petitioner leave for Cornell in 2002 unmolested, such argues against any legitimate business interest.

III. **May the respondent, to achieve objectives in Questions I and II, take actions materially adverse against the teaching of *Burlington Northern v. White*, 548 U.S. 53, 67-68 (2006) holding the anti-retaliation provision protects an individual from retaliation that produces injury/harm sufficient to dissuade a reasonable person in the plaintiff's position from making or supporting a charge of discrimination?**

Absent any validity, purely in retaliation for Title VII actions, the animal protocol violation charges none-the-less in fact ended petitioner's scientific research career. Absent court review, such charges once made may be reviewed only by the same Institution, foreclosing any impartial third-party fact-finding, a virtually unassailable form of retaliation against senior research scientists.

A. Animal Protocol Violations' Nexus With Petitioner's EEO Actions

The proximity in time for retaliatory action and nexus to Title VII litigation was always coincident. In the case of the animal protocol violations charges, LTC Peter Joseph Weina, who under oath stated he made the allegations, was present *August 22-23, 2002* when the possibility of petitioner leaving Walter Reed permanently to continue her research at Cornell was discussed. Walter Reed's Equal Employment Opportunity investigator, Mr. Duzor, embraced the idea and urged petitioner's immediate action to make her transfer to Cornell happen. Leishmaniasis in dogs is a class II pathogen, i.e. an infectious agent capable of infecting humans, therefore, identifying a research facility properly able to house and contain dogs naturally infected is difficult. Cornell was such a facility and petitioner had done some minimal prior research with Dr. Barr.

As indicated by his letter of October 4, 2002 (Exhibit 1, Dist. Ct. Dkt. 17), Dr. Barr was enthusiastic at the idea of petitioner conducting her dog research in his laboratory as his own research also dealt with canine leishmaniasis diagnosis and pathology, so petitioner's new antileishmanials drug research would further strengthen his research program at Cornell.

On or about August 28, 2002, petitioner was faxed all the required certifications from Cornell required by the Walter Reed Institute Animal Care and Use Committee, IACUC, to relocate her 32 research dogs to Cornell College of Veterinary

Medicine. Further, as senior GS14/08 research scientist, petitioner earned a sabbatical year for every seven years worked, she had worked over 21 years in 2002 earning three sabbaticals (taken none). Mr. Duzor, therefore, found a one year sabbatical "to get subsequent grant support established" a reasonable settlement; to include remaining research funds competitively awarded to petitioner to conduct her protocol CO02-00, >$105,000, and her 32 dogs transfer to Cornell with the understanding that even were petitioner not to gain any further funding, she would never return to Walter Reed post-sabbatical.

B. ***Protocol violations investigative process was fundamentally flawed: excluded petitioner, foreclosed knowledge of real allegations made for more than 4 years, accuser, LTC Peter Joseph Weina, had personal conflict of interest and did benefit by taking petitioner's 32 dogs and >$105,000 remaining funds for his unrelated polymerase chain reaction (PCR) diagnostic test development***

Petitioner, per Walter Reed's EEO investigator's urging to move swiftly to Cornell, wrote the required IACUC amendment #5, to move her 32 dogs to Cornell on or about *August 28, 2002, and within 24 hours, on or about August 28 or 29, 2002,* LTC Peter Joseph Weina, against whom Title VII petitioner's Title VII hearing was anticipated in a couple of months and was present *Aug. 22-23, 2002* when the EEO settlement was discussed, filed dog protocol violation charges against petitioner.

As detailed extensively in the court documents and briefs of petitioner, petitioner was excluded from the IACUC's investigative deliberations except for about two, two hour sessions, of weeks of meetings. Led in fact by LTC Weina, in late October, 2002, petitioner was removed as director of her own protocol CO02-00 and LTC Weina thereby gained administrative control of petitioner's 32 dogs and >$105,000 for about nine months, September 2002-April 2003, to use immediately thereafter, for his own polymerase chain reaction, PCR, diagnostic test development, a procedure wholly distinct and never part of petitioner's drug research protocol.

The Sept. 16, 2002, IACUC meeting transcript shows (Exhibit 36, Dist. Ct. Dkt. 11) and Peter Weina admitted in his deposition July 24, 2008, he is Witness 1, Tr. 55:15-16. who repeatedly reiterating his newly issued medical license "as a physician," before senior scientists of both the NIH grant agency and almost every Division within Walter Reed, [Tr. 77:5-15.] labeled petitioner a "freakin liar" who can't tell truth from lie because of unspecified mental impairment, never shows up for work, etc, etc. and should be precluded practice of her profession for the rest of her life. Tr. 78:7-12; Tr. 71:18-21; Tr. 75:17.

In his deposition July 24, 2008, LTC Weina admitted (i) he was a recent medical school graduate; (ii) he is not licensed to practice either psychiatry or psychology; Tr. 71:11-12. (iii) he never had a doctor:patient relationship with petitioner; Tr. 72:16-17. (iv) his assertions re mental status were not based on any test by a qualified licensed

practitioner. Tr. 71:20-21-72:1 Petitioner respectfully asserts, based on the rest of the tape transcript meeting discussion: e.g. what a problem employee petitioner was to file Title VII allegations against a military officer like LTC Weina, the latter defamation (Exhibit 36, Dist. Ct. Dkt. 11: IACUC 16 Sept 2002 court reporter transcribed transcript) was the actual protocol violations held and not the constantly shifting daily mix of "possible" allegations, revised almost hourly. Petitioner was never able to confront LTC Weina re any allegations he made, nor hear any purported witnesses' testimony.

C. *Petitioner continuously sought, 2002 thru the Present, impartial third party review of animal protocol allegations, exhausting administrative procedure, arguably rendering issue "ripe" for judicial review*

Petitioner, filed appeal with Office of Laboratory Animal Welfare late November 2002, amended her ongoing EEO complaint to include protocol charges in 2002 (but these were deemed outside the scope of the prior 2000-2005 EEO case). From 2002-2005, petitioner's attorney repeatedly requested respondent allow independent impartial third-party review of the protocol allegations made against petitioner, requests repeatedly denied.

After receiving three Freedom of Information Act, FOIA, 5 U.S.C. § 552 (2000), request denials and discovery denial for animal protocol allegations records, petitioner filed one more FOIA in 2005 (received in 2006) and with the new evidence of im-

propriety, in 2006 asked an attorney once again to file to obtain third party impartial review of the Walter Reed IACUC process and outcome on her behalf.

Prior, about Jan. 2002, the Office of Laboratory Animal Welfare or OLAW dismissed petitioner's request to review merely deferring back to the agency to self-investigate, as did the Office of Research Integrity in 2006, and in 2007, the Office of the General Counsel at NIH charged with investigation of science misconduct for petitioner's appeal for science misconduct stemming from the allegedly flawed IACUC proceeding. *See also, Abbs v. Sullivan,* 963 F.2d 918, 922, 929 (1992) (holding that the government's investigative procedures [Office of Research Integrity, Department of Health and Human Services] were invalid not having been promulgated in compliance with the Administrative Procedure Act; but also a scientist having exhausted administrative appeal or having a "ripe" issue may then permit judicial resolution.) In sum, petitioner did immediately and continuously pursue impartial third party review of the animal protocol allegations.

Absent federal court review there is no impartial third party administrative appellate process for review of animal protocol violations charges based on actual records. Here, LTC Peter Joseph Weina, petitioner's supervisor and accuser, completely rewrote petitioner's own dog protocol CO02-00 records allegedly "to help the IACUC in its investigation," petitioner was never afforded LTC Weina's revised research copies to defend the allegations, nor any other natural justice norms, e.g.

lack of notice of charge, lack of adequate opportunity to defend oneself, expulsion in bad faith [conflict of interest], violation of the regulation governing IACUC scope of authority (lacks authority to take punitive "taking" of research), insufficiency of accusation, tribunal not duly constituted, the actual allegations having nothing to do with animals or the protocol and those few provided in 2003-2004 court discovery, e.g. audio tapes of the meetings, having had all incriminating sections deleted compared to identical tapes obtained by FOIA in 2006 four years later.

Professional membership has been found to be quasi-judicial so that review by certiorari[31] may be deemed appropriate, see footnote 31 below. Declaratory relief has been granted the plaintiff in at least two of three cases.[32]

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[31] *See generally*, T.W. Cousens, *Suspension or expulsion from professional association and the remedies therefore*, 20 A.L.R. 2d 531 (2009), *citing People ex rel. Wilson v. Medical Soc. Of Duchess County* 84 Hun 448, 32 NYS 415 (1895) (holding that expulsion from professional membership may be viewed as semi-judicial or quasi-judicial or present a sufficient record to enable review in certiorari.

[32] *Weyrens v. Scotts Bluff County Medical Soc.* 133 Neb. 814, 277 NW 378 (1938) (declaration that expulsion was void, and asking injunction against depriving plaintiff of his rights as a member in good standing; relief denied); *Donaldson v. Institute of Botano-Therapy, Ltd.* 184 LT Jo 384 (1937, Ch Div) (declaration that plaintiff's name had been wrongfully deleted from the register of members, also asking order restoring it to same and an injunction restraining his exclusion from membership; relief granted). *Law v. Chartered Institute of Patent Agents* 2 Ch 276 (1919) (declaration that expulsion resolutions were invalid and ultra vires, also asking injunction against action thereon and against excluding plain-

D. ***Respondent's reprisal 2002-2006 (litigated continuously to present Oct. 2009) should be considered as "serial violation" retaliation constituting continuous interlinked reprisal to end petitioner's career.***

The doctrine of serial or continuing violation theory may be raised when facts alleged support its application even when the plaintiff did not specifically articulate the doctrine in the lower court. In the 1992 Sixth Circuit decision in *Haithcock v. Franks*,[33] the plaintiff, a former postal employee, alleged facts of serial violation in his EEO complaint but did not state the doctrine of continuing violation by name. The district court held he had waived the issue, and the Sixth Circuit reversed. The appellate court held it was sufficient that the plaintiff had alleged the facts upon which the legal theory could be grounded. In *Sosa v. Hiraoka*[34] the professor plaintiff filed a timely charge alleging discrimination in denial of promotion. He also alleged discrimination in denial of leave and travel expenses and an "augmented evaluation" process (essentially punitive in nature). The district court held these charges time-barred, and the Ninth Circuit reversed, holding the charges to be adequately related to a form of serial violation if proven.

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tiff from membership and from the privileges and benefits of membership; relief granted).

[33] 958 F.2d 671 (6th Cir. 1992).

[34] *Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990). *Contra, Fitzgerald v. Henderson*, 251 F.3d 345, 360 (2d Cir. 2001).

Petitioner's >7 years *continuous ongoing challenge* to the animal protocol charges made August 29, 2002 has cost her >$260,000 dollars in attorney and legal fees, and >$800 in FOIA page charges in 2006, several thousand for court reporter transcriptions of the various IACUC meetings in 2003, 2004, 2006, meetings to what in fact was really alleged against her, most having little to do with her dog protocol and much to do with her ongoing EEO litigation. Based on Respondent's assertions in error, the lower court found Respondent had repaid Petitioner's attorneys' fees in 2003.

Respondent neatly restricts the harm to the dates the animal protocol charges were given and investigated, ignoring petitioner's litigation spanning and continuous August 2002-present October 2009 as petitioner worked through first and second level administrative then federal court review (where deemed outside the scope of the case 2000-2005-never adjudicated) then taken to Office of Research Integrity in 2006 and Office of the Special Counsel at National Institutes of Health in 2007.

Petitioner respectfully states those facts and circumstances taken in totality of circumstances re Questions I and II, during ongoing EEO litigation and within weeks of EEO hearing schedule and her prompt compliance with Walter Reed EEO investigator's suggestion to settle in everyone's benefit by leaving August 2002 promptly for Cornell simply does not logically comport with the plain meaning of Fifth and Fourteenth Amendment "due process or equal protection" and does logically seem to

comport with forbidden personnel practices taught by *Burlington Northern v. White*[35] and agency investigative process that fails. Therefore petitioner respectfully argues that overturning the executive agency's IACUC protocol CO02-00 action against her is appropriate under Administrative Procedure Act of 1993, 5 U.S.C. §706 (2009).

E. *Admissions re purely legal matter may be deemed "of no effect."*

Regarding two admissions entered in defense by the respondent: first, respondent's attorney asked petitioner to "admit" during petitioner's deposition that the Honorable Judge Williams had issued his March 2008 opinion limiting the case to two issues, excluding that of the animal protocol violations, and if not answered, some form of sanctions were appropriate [presumably, Federal Rule of Civil Procedure 37]; second, the same request was made of petitioner during deposition with same legal threat "to admit" the IACUC "had made a decision regarding petitioner's alleged animal protocol violations allegations. This was material error in that the lower court admitted these two deposition answers as admissions against Constitutional due process and equal protection, and against the teachings of *Cedyco Corp. v. Whitehead*.

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[35] *Burlington Northern v. White*, 548 U.S. 53, 67-68, 126 S. Ct. 2405 (2006) (holding the anti-retaliation provision protects an individual...from retaliation that produces an injury or harm not limited only to ultimate employment decisions. The standard is the materiality of the challenged act to dissuade a reasonable person in the plaintiff's position from making or supporting a charge of discrimination.)

> a request for admission as to a purely legal issue is improper, and a deemed admission involving a *purely legal matter is of no effect*; because the primary purpose of requests for admissions is to simplify trial by eliminating matters about which there is no real controversy, *but requests for admissions were never intended to be used as a demand upon plaintiff or defendant to admit he had no cause of action* or ground of defense. (emphasis added) 4 Am. Jur. Trials § 215 (2009) *citing Cedyco Corp. v. Whitehead,* 253 S.W.3d 877, 880 (Tex. App. 2008). (emphasis added)

Petitioner argues that her two admissions re one the initial lower court's legal opinion and the second re executive administrative decisions were legal matters and were, therefore, properly may be deemed "of no effect" invoking *Cedyco. Id.* at 880.

F. *Petitioner Respectfully Asserts Animal Protocol Violations Charges Are Properly At Issue*

Petitioner also argues the animal protocol violations are properly before the court because the petitioner amended her complaint invoking Federal Rule of Civil Procedure 15 (a) ..."*once as a matter of course before the responsive pleading* is served...and (b) *amendments to conform to the evidence.*" Here, petitioner mistakenly entitled her request to amend, "Motion to Reconsider" but filed

the Rule 15 motion, Dist. Ct. docket doc. #18, before #19 "[Respondent's] Answer to Complaint," thus, petitioner's motion may be deemed timely "as a matter of course" to amend and also to conform issues to the evidence of both parties.

The animal protocol charges were found outside the scope of the petitioner's 2002-2005 litigation, thus were never prior adjudicated. For all these reasons, denial by the lower court to grant petitioner's motion to amend to place the animal protocol charges at issue and also to allow respondent's request(s) for admission of law to stand in evidence may be viewed as plain error despite petitioner's failure to object promptly. *Cedyco Corp. v. Whitehead,* 253 S.W.3d 877, 880 (Tex. App. 2008).

G. ***Not credible is respondent's defense to petitioner's assignment from duties of Senior Research Scientist/Program Manager [GS13-GS14/08] for >25 years to duties of a high school entry level technician rated by a professional employment specialist as (GS5-9) was appropriate because "the program in which petitioner worked no longer existed" from about Sept. 30, 2002-2006.***

Petitioner respectfully argues that respondent offers no credible evidence embodied in any writing for the mere oral assertions that petitioner was properly demoted to technical duties from April 2004-July 2006 because the program in which she worked, then a >$12,000,000 Congressionally funded program from 2003-2006 "no longer ex-

isted." Published contradictory evidence entered into evidence and argued vigorously by petitioner is herewith provided again. Exhibit 38, Dist. Ct. Dkt. 55. [2006 published leishmanial *new drug research annual* progress report to Major General Eric B. Schoomaker], Exhibit 12, Dist. Ct. Dkt. 18. [published two consecutive annual postdoctoral recruitment booklets, recruiting lower level postdoctoral [contract] employee to conduct petitioner's new antileishmanial drug research, one issued in 2003, second issued in 2004, petitioner is mentioned by name in both published recruitment advertisements.] Thus, petitioner respectfully argues respondent's defense "no program existed" should be deemed of no merit, a material error, and the retaliation petitioner alleged should be found.

IV. The Court Should Hear This Case Now

The facts and circumstances in this case raise issues having profound medical implications for tens of thousands of deployed military and their families (Part I) and also impacting a majority of senior research scientists in this country. Data complied by the National Science Foundation (NSF), reported in 1990, showed that the federal government was the largest single employer of scientists and engineers in the United States.[36]

The Department of Defense employed the largest number (DOD, 49%), followed by The Department of Agriculture (USDA, 12.8%),

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[36] Alan K. Campbell, Linda Dix, *Recruitment, Retention, and Utilization of Federal Scientists and Engineers*, 99 (Natl. Academy Press 1990).

Department of the Interior (6.8%), National Aeronautics and Space Administration (NASA, 5.5%), Department of Health and Human Services (HHS, 3.9%), and Department of Commerce (3.7%).[37] Executive agency restrictions placed on dissemination of research results negatively impacts the pace of United States' research progress, jeopardizes public health protection, health advancements, and is an overriding disincentive for productive scientists to remain in federal service.

Scientists are rated, for grant awards, pay, and employment mobility based on the quality and the quantity of the peer-reviewed research publications. "Publish or perish" is reality, to remain a research science professional. It follows, therefrom, for the respondent not only to deny petitioner disclosure of the ultimate achievement success of >15 years hard meticulous work, but assigning the new drug breakthrough as the achievement of one who merely replaced petitioner's name fraudulently on petitioner's protocol and progress reports ended petitioner's research career not only in government, but anywhere particularly combined with two felony allegations, and defamation before two federal institutes as mentally and morally impaired.

The respondent's actions are properly viewed not as isolated acts but rather considered in totality taken as a whole creates a 15 year "hole" of lost research productivity for petitioner by respondent's acts arguably meeting legal definitions of data falsification, plagiarism, and also, misappropriation, taken as a whole can not be overcome constituting

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[37] *Id.* at 99.

almost 50% of her professional career in science. Nor, petitioner respectfully argues, should such be a burden that should placed in Title VII retaliation and against the First Amendment on any senior scientist-petitioner to overcome.

Petitioner respectfully asserts the respondents' failed their burden of proof, basing their defense on unsubstantiated assertions and error both of fact and of law, as herein discussed, and, therefore, be logically viewed as plain material error and overturned as such.

PETITION FOR TRIAL *DE NOVO* AND FOR CERTIORARI

1. On October 19, 2009, Joan E. Jackson, petitioner, filed in the court of The Supreme Court of the United States showing there is no other adequate, plain, or speedy remedy at law or in equity requests certiorari.

2. Joan E. Jackson respectfully petitions the Court for issuance of a writ of certiorari for trial *de novo* for *supersedeas* of the judgment of the United States Court of Appeals for the District of Maryland on this case.

Dated this 24th day of December 2009.

Dr. Joan E. Jackson, PhD,
Petitioner *Pro se*
P.O. Box 1505
Onset, Massachusetts 02558-1505
Cell Phone: 301-661-9002
Email: jacksonall@aol.com

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APPENDIX A

Document: 20 FILED: July 21, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOAN E. JACKSON,	)	
Plaintiff – Appellant	)	
vs.	)	
PETER GEREN,	)	No. 09-1081
The Honorable, Acting Secre-	)	(8:07-cv-00851-AW)
tary, Department of the Army,	)	ORDER
Defendant – Appellee	)	
vs.	)	
BRIANNA SKINNER-HARRIS,	)	
Movant	)	

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Shedd, and Judge Agee.

For the Court
/s/ Patricia S. Connor, Clerk
Patricia S. Connor, Clerk

Document: 17-1 FILED: May 13, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOAN E. JACKSON,	)	
Plaintiff – Appellant	)	
vs.	)	
PETER GEREN,	)	No. 09-1081
The Honorable, Acting Secre-	)	(8:07-cv-00851-AW)
tary, Department of the Army,	)	JUDGMENT
Defendant – Appellee	)	
vs.	)	
BRIANNA SKINNER-HARRIS,	)	
Movant	)	

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Connor, Clerk
Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOAN E. JACKSON,	)	
Plaintiff – Appellant	)	
vs.	)	
PETER GEREN,	)	No. 09-1081
The Honorable, Acting Secre-	)	(8:07-cv-00851-AW)
tary, Department of the Army,	)	JUDGMENT
Defendant – Appellee	)	
vs.	)	
BRIANNA SKINNER-HARRIS,	)	
Movant	)	

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge.

Submitted: April 29, 2009 Decided: May 13, 2009

Before the Honorable Circuit Judges: WILKINSON, SHEDD, and AGEE

Affirmed by unpublished per curiam opinion.

Counsel: Joan E. Jackson, Appellant, *Pro Se*;
Alex Gordon, Assistant United States Attorney, Baltimore, Maryland, for Appellee

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Dr. Joan E. Jackson appeals the District Court's order granting summary judgment in favor of the Honorable Peter Geren, Acting Secretary, Department of the Army, on her claim for retaliation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons given by the District Court. *Jackson v. Geren*, No. 8:07-cv-00851-AW (D. Md. Nov. 14, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

JOAN E. JACKSON,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. AW-07-851
THE HONORABLE	)	
PETER GEREN,	)	
Acting Secretary,	)	
Dept. of the Army,	)	
Defendant.	)	

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MEMORANDUM OPINION

Plaintiff Joan E. Jackson ("Plaintiff"), acting *pro se*, brings this action against Defendant Peter Geren, Acting Secretary, Department of the Army ("Defendant"), pursuant to Title VII of the Civil Rights Act of 1964, §§ 701, *et seq.* and 42 U.S.C.A. §§ 2000e, *et seq.*, claiming retaliation for filing an Equal Employment Opportunity ("EEO") Complaint and participating in court hearings against the Secretary of the Army regarding discrimination, and injurious falsehood.[1] Currently pending before the Court is Defendant's Motion to Dismiss or, in the Alterna-

[1] The specific "injurious falsehood" claimed by the Plaintiff is defamation. Thus, "injurious falsehood" and "defamation" will be used interchangeably throughout this document.

tive, Motion for Summary Judgment (Doc. No. 6).[2] The Court has reviewed the entire record, as well as the Pleadings and Exhibits, with respect to the instant motion. No hearing is deemed necessary. *See* Local Rule 105.6 (D. Md. 2008). For the reasons set forth below, the Court will GRANT-IN-PART and DENY-IN-PART Defendant's motion.

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[2] Plaintiff has also filed a Motion for Summary Judgment or, in the Alternative, Jury Trial (Doc. No. 11). The Court, however, will construe this motion as Plaintiff's response in opposition to Defendant's Motion. While Plaintiff has filed Docket Entry Number 11 as a "Motion for Summary Judgment" and Plaintiff makes reference to her filing being a "Motion for Summary Judgment or, in the Alternative, Jury Trial," Plaintiff never sets forth a standard for summary judgment, nor does she refer to the standard throughout her response. Plaintiff also asks the Court to grant her directed verdict or, in the alternative, jury trial on the issues presented before the Court. The Court recognizes, as Plaintiff has even acknowledged, the potential legal deficiencies in her documents, as Plaintiff admits to not having professional legal training or experience. Considering such deficiencies, the Court does not believe that Plaintiff has properly made and supported a motion for summary judgment. Instead, Plaintiff's filing appears to be a response to Defendant's motion for summary judgment, instead of an actual motion or cross-motion for summary judgment. Furthermore, to the extent that Plaintiff's response can be considered as a motion for summary judgment, the Court does not believe that Plaintiff has presented a sufficient basis for establishing summary judgment on the issues currently before the Court.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken in the light most favorable to the non-movant. Plaintiff Jackson is a 59-year-old Ph.D. senior research scientist. In March 1981, Plaintiff was hired by the Department of the Army, based at the Walter Reed Army Institute of Research ("WRAIR"), as a civil service civilian, GS-13 Supervisory Research Zoologist. Plaintiff was promoted to GS-14 step 05 in 1991, and worked in the Department of Parasistology, Division of Experimental Therapeutics ("DET") until April 2004, when she was placed on temporary detail with the Department of Entomology, Division of Communicable Disease and Immunology ("DCD&I").

On February 21, 2001, Plaintiff filed a formal EEO complaint against WRAIR, claiming discrimination based on her age,[3] gender (female), and reprisal (based on a previous claim of discrimination Plaintiff had filed alleging sexual harassment and harassment on the job).[4] Plaintiff amended her formal complaint of discrimination in July 2001 and again in November 2001. On February 27, 2002, Plaintiff requested a hearing before an administrative judge at the Equal Employment Opportunity Commission ("EEOC"). In November 2002, as a result of the hearing proceeding, Plaintiff reached an initial settlement

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[3] At that time, Plaintiff was 52 years old.

[4] Plaintiff filed an informal complaint of discrimination with WRAIR's EEO office on November 17, 2000.

with WRAIR, whereby Plaintiff would retire from the facility and receive attorney's fees. During the period of settlement discussions, Plaintiff was placed on paid administrative leave.

In April 2003, Plaintiff filed a breach of settlement claim with the Department of the Army, Equal Opportunity Compliance and Complaints Review Agency ("Compliance Agency"). In a decision dated May 20, 2003, the Compliance Agency concluded that the settlement agreement was invalid because it did not meet the statutory requirements of the Older Workers Benefit Protection Act, and ordered WRAIR to resume processing of Plaintiff's case. Plaintiff subsequently re-instituted her complaint, which she later filed in federal court. Litigation ensued, during 2004-2005, as to whether WRAIR discriminated against Plaintiff on the basis of gender, age, sexual harassment, harassment on the job, and reprisal. Judge Roger Titus, United States District Judge for the District of Maryland, found for the Agency in 2004 and dismissed Plaintiff's complaint. Plaintiff appealed her case to the United States Court of Appeals for the Fourth Circuit, which affirmed Judge Titus' dismissal.

Plaintiff subsequently filed this action as an EEO complaint, which she later dismissed in order to bring her claims in federal court. Plaintiff filed suit in this Court on April 3, 2007, alleging retaliation and injurious falsehood.

STANDARD OF REVIEW

Defendant has moved this Court to dismiss for failure to state a claim on the basis of Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment on the basis of Rule 56. "A court only considers the pleadings when deciding a Rule 12(b)(6) motion." *Villeda v. Prince George's County*, 219 F. Supp. 2d 696, 698 (D. Md. 2002). However, if matters outside the pleadings are presented to and not excluded by the court, the motion must be considered under the summary judgment standard of Rule 56. *Id.*; *see also* Fed. R. Civ. P. 12(d). All parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *Nat'l Mortgage Warehouse, LLC v. Trikeriotis*, 201 F. Supp. 2d 499, 502 (D. Md. 2002). Where a party knows that materials outside the pleadings are before the court, that party is considered to have notice that the motion to dismiss may be treated as a motion for summary judgment. *Id.*; *see also Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985) (noting that the requirement that all parties must be given "reasonable opportunity" to present relevant information to the Court may be satisfied if a party is "aware that material outside the pleadings is before the court").

While Defendant has entitled its motion as a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, both parties have submitted matters outside the pleadings and both rely on such documents extensively in their briefs. Furthermore, it does not appear that Plaintiff necessarily opposes converting the motion, as

she not only titled her response in opposition to Defendant's motion as a "Motion for Summary Judgment or, in the Alternative, Jury Trial," but also attached an exhaustive compilation of exhibits – even more than Defendant – to her response brief. Thus, this Court will consider Defendant's motion as one for summary judgment and rule accordingly.[5]

Summary judgment is appropriate only if there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986).

When ruling on a motion for summary judgment, the court must view the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The moving party discharges its burden by showing an absence of evidence to support the

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[5] Courts also consider how a party captions its own pleading. Laughlin v. Metro Washington Airports Auth., 149 F.3d 253, 261 (4th Cir. 1998). *See Montrose Educ. Servs. v. Sylvan Learning Sys.*, No. RDB-06-308, 2007 U.S. Dist. LEXIS 23697 at *7 n.5 (D. Md. 2007) ("Given that the Defendants in this case moved for dismissal or summary judgment, that the Plaintiff captioned its Opposition [] in a similar fashion, and that both the Defendants and the Plaintiff attached documents to their briefs, all three parties were certainly on notice that this Court might make a summary judgment determination. In addition, Plaintiff did not request additional time for discovery in its Opposition. Thus, they have had a reasonable opportunity to provide material regarding summary judgment, in satisfaction of Rule 12(b).").

non-moving party's case. *Celotex*, 477 U.S. at 325. When faced with a motion for summary judgment, Rule 56(e) requires the non-moving party "to go beyond the pleadings" and show the existence of a genuine issue for trial, by way of affidavits, deposition testimony, or answers to interrogatories. *Id.* at 324; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). While the evidence of the non-movant is to be believed and all justifiable inferences drawn in his or her favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. *See Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330-31 (4th Cir. 1998); *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

DISCUSSION

I. RETALIATION

To establish a claim for retaliation, Plaintiff must show: (1) she engaged in protected activity; (2) Defendant took action that would be "materially adverse to a reasonable employee or job applicant;" and (3) there is a causal connection between the protected activity and the asserted adverse action. *Burlington N. & Sante Fe Rwy. Co. v. White*, 126 S. Ct. 2405, 2409 (2006); *see also Lettieri v. Equant, Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). In determining whether the alleged retaliatory action is materially adverse as required for the second element, the Court should ask whether it was harmful enough to "dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 126 S. Ct. at 2409.

If Plaintiff establishes a *prima facie* case of retaliation, Defendant must then offer a legitimate, nondiscriminatory basis for the adverse employment action. *Matvia v. Bald Head Island*, 259 F.3d 261, 271 (4th Cir. 2001). Provided that the defendant is able to satisfy this burden, Plaintiff then has the opportunity to prove that the asserted reason is pretextual. *Id.* This can be accomplished by showing that the employer's explanation is "unworthy of credence or by offering other forms of circumstantial evidence sufficiently probative of [retaliation]." *Price v. Thompson*, 380 F.3d 209, 212 (4th Cir. 2004).

Here, it is undisputed that Plaintiff engaged in protected activity where she filed EEOC complaints and offered testimony against Defendant.[6] Defendant, however, argues that Plaintiff cannot establish the other two elements. In her complaint, Plaintiff alleges that Defendant discriminated against her by taking adverse employment actions by: (1) giving her negative performance evaluations, despite her history of receiving "topmost" annual performance ratings for every year that she was employed at WRAIR, in addition to performance and achievement awards and letters of appreciation; (2) restricting Jack-

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[6] In her complaint, Plaintiff also alleges that she participated in an investigation against the Secretary of the Department of the Army in 2002, 2003, and 2004, and corresponded with United States Senators Paul Sarbanes and Barbara Mikulski regarding mismanagement of patient diagnostic programs related to the Gulf War Syndrome. Plaintiff also alleges that she cooperated in a court hearing against the Secretary of the Department of the Army on her discrimination charges.

son's ability to publish her research and carry out further research; (3) creating impediments to work;[7] and (4) demoting Jackson to an inferior lab position.

Defendant separately discusses each of Plaintiff's four allegations of reprisal and appears to suggest that each alleged retaliatory act should be considered individually to determine if the retaliation claim can withstand a motion to dismiss or summary judgment. The Supreme Court has stated that "the significance of any given act of retaliation will often depend upon the particular circumstances." *Burlington*, 126 S. Ct. at 2415. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* (citing *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1003). As such, the Court will evaluate the claims related to retaliation "from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Burlington*, 126 S. Ct. at 2417.

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[7] Plaintiff's complaint and brief seem to suggest that the "impediments to work" claim is embodied in other claims of retaliatory acts (performance evaluation, restrictions on publication, and demotion). Therefore, the Court will address this claim together with the other claims of retaliatory acts.

A. Performance Evaluation

Plaintiff alleges that prior to her participation in protected activity, she received excellent and topmost annual job performance evaluations every year of her employment at WRAIR. Plaintiff contends that her performance evaluations deteriorated within six months of her filing the EEO complaint. Defendant argues that Plaintiff did not experience any materially adverse consequences from the performance evaluations. Defendant notes that Plaintiff's June 30, 2002 performance rating was an "86 out of 100." While Defendant agrees that the rating was lower than ratings Plaintiff had previously received, Defendant maintains that Plaintiff was still in the "superior" category and that the performance rating had the same outcome as Plaintiff's previous evaluations. Defendant also states that Plaintiff's "rater" recommended that she receive the same shares from the bonus pool as she had been awarded in previous periods.

Moreover, Defendant maintains that giving a poorer than expected evaluation does notconstitute adverse employment action. To support its argument, Defendant cites *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377 (4th Cir. 2004), where the Fourth Circuit has held that performance evaluation is only actionable when the employer uses it to "detrimentally alter the terms or conditions of the recipient's employment." Plaintiff does not articulate to what extent she was adversely effected by the 2002 performance appraisal, nor is there anything in the record to suggest that the evaluations were used to "detrimentally alter

the terms or conditions of" Plaintiff's employment. *James*, 368 F.3d at 377.

Here, the record reflects that Plaintiff's performance rating had the same outcome as her previous evaluations. Moreover, Plaintiff's ratings still placed her in the "superior" category and recommended that she receive the same shares from the bonus pool as she had been awarded in previous periods. Based on these circumstances, the Court does believe that the negative performance evaluations constitute a materially adverse employment action that would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 126 S. Ct. at 2415. Therefore, the Court finds that Plaintiff cannot sustain a retaliation claim based on the negative performance evaluations and, accordingly, must grant summary judgment in favor of Defendants.

B. Restrictions on Publishing

Plaintiff next alleges that she was not allowed to publish her work after participating in court hearings against the Department of the Army. On June 10, 2004, Plaintiff submitted one abstract and one review paper to her superiors for approval prior to publication. Through her lawyer, Plaintiff later submitted two additional papers in August 2004, and requested that her coauthors be given approval for these publications as well. Plaintiff alleges that clearance for these publications were unnecessarily delayed in retaliation for Plaintiff's past EEO actions. Additionally, Plaintiff claims that, prior to her partici-

pation in protected activity, she had published her work for 30 years; however, she was permanently precluded from publishing after such participation. Plaintiff also asserts that, in addition to WRAIR precluding and delaying the disclosure of her research, her assignment to the inferior lab position effectively hindered her ability to publish because she was no longer designing and executing work independently.[8]

Plaintiff notes the importance of publishing to scientists and states that grants to conduct further research are directly linked to the peer-reviewed science journal publications regarding current research progress.

Considering the evidence presented with respect to delay and restriction in publication, the Court finds that Plaintiff has satisfied the second element – that Defendant's action was materially adverse to a reasonable employee. Being delayed and/or completely restricted from publishing, after publishing for 30 years, can certainly be characterized as "materially adverse" to a reasonable employee. The Court also notes Plaintiff's argument that, as a senior scientist who is expected to publish and present work, Plaintiff's publications are directly linked to obtaining funding for additional research.[9] As to the third element, drawing all inferences in favor of Plain-

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[8] Plaintiff's reassignment will be discussed in detail below.

[9] See Def.'s Ex. 1 at 202-03 (noting "without funding for a project it's fairly difficult - you can't start your own research without some funding []").

tiff, there is sufficient evidence from which a jury could find a causal connection between Plaintiff filing and amending her EEO complaints – which ultimately resulted in Plaintiff filing suit against Defendant for discrimination in May 2004, less than one month before Plaintiff submitted her first abstract and review paper for approval for publication – and the alleged retaliatory actions. *See Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998) (holding that proximity in time between the protected activity and the adverse employment action may be sufficient to establish the causation requirement).

Having found that Plaintiff has established a *prima facie* case for retaliation based on delay and restrictions in publishing, Defendant must now articulate some legitimate, nondiscriminatory reason for such delay and restriction. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (noting that the burden shifts to "the employer to articulate some legitimate, nondiscriminatory reason" for its action). Here, Defendant contends that any delays faced by the Plaintiff with respect to publishing were normal, and notes that it was common for WRAIR employees to have to wait between three and six months to be authorized to publish due to a backlog of such requests. Defendant further contends that delay also resulted from a research protocol conducted by

Plaintiff that violated WRAIR protocols.[10] Defendant presented evidence establishing that the approving Colonel responded to Plaintiff's requests for authorization for publications in a timely manner – less than a month after Plaintiff requested authorization for publication – and made reasonable requests for additional information before he could authorize release of the work. Defendant also notes that the requests for additional information resulted from WRAIR requirements that researchers not use any data obtained from studies in which animals were treated improperly, and, before the Colonel would give his approval, he sought to gain assurance from Plaintiff that she did not use that data.[11] Moreover, Defendant contends that, with regard to authorization for release of the abstract, Plaintiff acknowledged the possibility that WRAIR might not be able to approve release before her conference because she recognized that WRAIR had a six-month approval time. Defendant also notes, in regards to Plaintiff's request for authorization of the two additional papers, that WRAIR informed Plaintiff's attorney that approval would take longer than expected because

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[10] Plaintiff notes that the validity of the animal protocol allegations is currently being appealed in a non-EEO legal venue.

[11] Defendant contends that Plaintiff admitted to protocol violations – Animal Study Protocol #CO02-00 – in her animal testing research. Because of the violations, the approving Colonel wrote to Plaintiff requesting that Plaintiff confirm that her articles did not cite data obtained through research protocol C002-00 because WRAIR did not authorize publication of research obtained in studies that have violated WRAIR protocols.

approving Colonels were on duty at other sites. Defendant also notes that Plaintiff's first two submissions were approved on September 3, 2004.

Based on the evidence presented, the Court finds that Defendant has articulated a legitimate, non-discriminatory reason for its action with respect to delay in publishing. Thus, the burden shifts back to the Plaintiff to present evidence that this reason was pretextual. *See McDonnell Douglass*, 411 U.S. at 804. Some factors this Court may consider in deciding whether there is sufficient evidence of a pretext include: "the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case . . . ." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148-149 (2000). Here, Plaintiff has not shown this Court sufficient evidence for a trier of fact to reasonably conclude that Defendant's proffered reasons with respect to the delay in publication were pretextual or false. Thus, the Court finds that Defendant is entitled to judgment as a matter of law with respect to Plaintiff's retaliation claim based on delay in publishing.

The Court, however is not persuaded that Defendant has sufficiently presented a legitimate, non-discriminatory reason for its action with respect to restrictions on Plaintiff's publication. While Defendant focuses more on the delay in publication and notes that Plaintiff's first two submissions were approved, Defendant fails to state reasons for denying "unconditional clearance"

and complete restriction for Plaintiff to publish.[12] Therefore, the Court cannot grant summary judgment with respect to the restrictions in publishing.

C. Demotion

Plaintiff also alleges, with respect to her retaliation claim, that after being on administrative leave for sixteen months – pending an investigation by the EEO of the Agency for misconduct associated with the 2002 EEO settlement breach – she was ordered to return to work to perform assigned technical duties. Plaintiff states that she was not assigned to her previous position as a Laboratory Director/Program Manager/Senior Scientist (GS14/08, which she had been for over 10 years) in the Department of Parasistology, Division of Experimental Therapeutics ("DET"), but was instead given a temporary 120-day Ph.D. entry level technical support position (GS5-7) in the Department of Entomology, Division of Communicable Disease and Immunology ("DCD&I"). Despite this position initially being a temporary 120-day position, Plaintiff's placement was extended on several occasions, resulting in Plaintiff serving in this position for over two years – from April 2004 until approximately July 2006. Plaintiff further asserts that this position was more administrative in nature, and that official employment records reflected that she was a "technician" and not a "Laboratory Direc-

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[12] Plaintiff claims there was an absolute preclusion to publish her research findings under her own name as lead or senior author for over four years and into the indefinite future. *See* Pl.'s Ex. 22.

tor/Program Manager (Supervisor)" for that time period.

Defendant asserts that Plaintiff had not completed the training requirements as mandated by WRAIR's Institutional Animal Care and Use Committee ("IACUC") before resuming to work with animals, and, thus, Plaintiff was not qualified to return as a Preliminary [Principal] Investigator. Defendant also asserts that a "reasonable employee" would not have found the new position to be materially adverse because Plaintiff received the same salary and remained at the same work grade. Defendant also attributes "funding reductions" as an additional reason for preventing Plaintiff from returning to her previous position.

Based on the Court's review of the record, it appears that a trier of fact could conclude that Plaintiff's placement in April 2004 is considerably different from her previous position. Plaintiff went from a supervisory role, primarily responsible for facilitating research, securing funding, and publishing associated research (alleged grade of GS14), to one involving technical duties and support (alleged grade of GS5-7). The loss of supervisory or managerial authority cannot neatly be classified as de minimis, intangible, or unmeasurable. *Csicsmann v. Sallada*, 211 Fed. Appx. 163, 169 (4th Cir. 2006). While "reassignment with significantly different responsibilities" can give rise to Title VII action, the reassignment "must have significant detrimental effect[s]." *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999). Plaintiff states that by virtue of being in that position,

her ability to publish was hindered, as she was permanently precluded from disclosing her unprecedented research associated with her previous position, and thus, completely restricted from publishing. The Court notes that the reasons for such complete restrictions are in dispute. Plaintiff further asserts that such demotion not only restricted resources, but it effectively precluded future opportunity for her professional development and continued professional employment.

Considering Plaintiff's reassignment to a position that is, according to Plaintiff, of a substantial lesser grade with inferior duties and responsibilities, along with facts denoting absolute restrictions on publishing, the Court finds that Plaintiff has satisfied the second prong – that Defendant's actions were materially adverse to Plaintiff. There is also sufficient evidence from which a jury could find a causal connection. The position reassignment took place immediately after Plaintiff was removed from administrative leave pending the EEO investigation of the Agency, and Plaintiff's request for publication, made in June 2004, was made subsequent to her filing her EEO complaint and in the midst of pending litigation against Defendant for discrimination. Therefore, viewing the evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff has established a *prima facie* case for retaliation with respect to the demotion.

Now shifting the burden, the Court expresses some reservation with respect to whether Defendant has presented a legitimate, non-discriminatory reason for Plaintiff's reassignment

to the entry level technical support position. Specifically, the Court has not been persuaded by Defendant's justification for requiring Plaintiff, a person with a wealth of years of directorial, managerial, and supervisory experience at the WRAIR, to remain in a temporary 120-day entry-level technical support position, with substantially different duties and responsibilities, for approximately two years. Therefore, viewing the evidence in the light most favorable to Plaintiffs, the Court cannot, at this point, grant summary judgment in favor of Defendant, and will, instead, allow Plaintiff's retaliation claim on the grounds of the demotion to the inferior lab position to proceed.

II. Injurious falsehood

Plaintiff next alleges that Defendant defamed her in a conversation with Stephen Barr of Cornell University, director of a lab to which Plaintiff was hoping to move her research. The Federal Tort Claims Act ("FTCA") provides a vehicle through which a claimant can recover damages resulting from a tort committed by the government. 28 U.S.C. § 1346 (b)(1). While the FTCA waives the United States' sovereign immunity for certain torts, the Act allows the government to retain immunity from suits predicated upon "[a]ny claim arising out of . . . libel, [or] slander . . . ." *Id.* at § 2680(h).

Defendant argues that Plaintiff's defamation claim is barred by the FTCA. Although Plaintiff contends that the government waived sovereign immunity because Plaintiff raised a

grievance of defamation through Administrative Procedures invoking the Administrative Procedure Act,[13] the Court finds no support, and Plaintiff has offered none, for the position advanced by Plaintiff. Therefore, as Plaintiff has attempted to bring a defamation claim against WRAIR, a government entity, the Court must dismiss Plaintiff's claim as the government has retained immunity from such claim under the FTCA. Accordingly the [C]ourt will grant summary judgment as a matter of law in favor of Defendant.

CONCLUSION

For the foregoing reasons, the Court will GRANT-IN-PART Defendant's Motion for Summary Judgment as to Plaintiff's injurious falsehood claim and Plaintiff's retaliation claim with respect to negative performance evaluations and delay in publishing and DENY-IN-PART Defendant's motion as to retaliation on the grounds of restriction from publishing and demotion, as there are still material facts in disputes regarding the change in position, grade level, duties, and responsibilities, as well as disputes regarding Defendant completely restricting Plaintiff from publishing. The Court will set this matter for trial on the

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[13] Plaintiff cites 5 U.S.C.A. § 704 to support her proposition; however, this section relates to "Actions Reviewable" and does not address the issue of whether the government has waived sovereign immunity.

remaining issues.[14] An Order consistent with this Opinion will follow.

March 25, 2008
Date

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

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[14] The Court strongly encourages Plaintiff to employ counsel to assist her in litigating this action.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

JOAN E. JACKSON,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. AW-07-851
THE HONORABLE	)	
PETER GEREN,	)	
Acting Secretary,	)	
Dept. of the Army,	)	
Defendant.	)	

****

ORDER

For the reasons stated in the accompanying Memorandum Opinion, IT IS this **25th day of March, 2008**, by the United States District Court for the District of Maryland, hereby **ORDERED:**

1. That Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (Doc. No. 6) BE, and the same hereby IS, **GRANTED-IN-PART** and **DENIED-IN-PART;**

2. That Plaintiff's Motion for Summary Judgment or, in the Alternative, Jury Trial (Doc. No. 11) BE, the same hereby IS, **TERMINATED**;[1]

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[1] As explained in the Memorandum Opinion, the Court will treat Plaintiff's Motion for Summary Judgment as Plaintiff's response in opposition to Defendant's Motion for

3. That this matter be set for trial on all remaining issues;

4. That the Clerk of the Court transmit a copy of this Memorandum Opinion and Order to all counsel and parties of record and mail a copy to the pro se Plaintiff.

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

Summary Judgment. Therefore, the Court asks the Clerk to terminate Plaintiff's motion as such.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

JOAN E. JACKSON,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. AW-07-851
THE HONORABLE	)	
PETER GEREN,	)	
Acting Secretary,	)	
Dept. of the Army,	)	
Defendant.	)	

****

ORDER

For the reasons stated in the accompanying Memorandum Opinion, IT IS this **14th day of November, 2008**, by the United States District Court for the District of Maryland, hereby,
ORDERED:

1. That Defendant's Motion for Summary Judgment (Paper No. 46) BE, and the same hereby IS, **GRANTED**;

2. That Plaintiff's Cross Motion for Summary Judgment (Paper No. 55 and 60) BE, and the same hereby IS, **DENIED**;

3. That the various Motions contained in Paper No. 31, 35, 42, 49, 50 and 54 be **DENIED as moot**.

4. That the Clerk of the Court **CLOSE** this case; AND

5. That the Clerk of the Court transmit a copy of his Memorandum Opinion and Order to all counsel and parties of record.

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JOAN E. JACKSON,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. AW-07-851
THE HONORABLE	)	
PETER GEREN,	)	
Acting Secretary,	)	
Dept. of the Army,	)	
Defendant.	)	

****

MEMORANDUM OPINION

Plaintiff Joan E. Jackson ("Plaintiff" or "Dr. Jackson"), acting *pro se*, brings this action against Defendant, Peter Geren, Acting Secretary, Department of the Army ("Defendant"), pursuant to Title VII of the Civil Rights Act of 1964,§ 701, *et seq[.]*, and 42 U.S.C.§ 2000e, *et seq.*, claiming retaliation for filing an Equal Employment Opportunity ("EEO") Complaint, participating in court hearings against the Secretary of the Army regarding discrimination and reporting perceived program mismanagement at Walter Reed Army Institute of Research to members of Congress ("WRAIR"). Currently pending before the Court is Defendant's motion for summary judgment (Paper No. 46), Plaintiff's cross motion for summary judgment or,

in the alternative for jury trial (Paper No. 55), and several discovery motions filed by Plaintiff (Paper Nos. 31, 35, 42, 49, 50 and 54). The Court has reviewed the entire record, as well as the pleadings and exhibits. The Court held a telephonic hearing on the Defendant's motion and Plaintiff's cross motion on November 7, 2008. For the reasons set forth below, the Court will grant Defendant's motion for summary judgment.

I. Factual and Procedural Background

A. Factual Background

The following facts are taken in the light most favorable to Plaintiff. Dr. Jackson was employed as a research scientist with the Department of the Army, based at the WRAIR. While under the employ of WRAIR, Dr. Jackson held the title of Research Zoologist, DV 0410-III (Paper No. 6 Ex. 1). Dr. Jackson worked as a civil research scientist, GS-13, in the Department of Parasitology, Division of Experimental Therapeutics ("DET"). In February 2001, Dr. Jackson filed an EEO complaint against WRAIR claiming discrimination based on her age, gender and a retaliation for a previous claim she had filed alleging sexual harassment. (Paper No. 6 Ex. 3) A two day hearing was held, during which Dr. Jackson was represented by counsel. As a result of the hearing, in November 2002, Dr. Jackson and WRAIR reached an initial settlement agreement. (Paper No. 55 Ex. 12) During this same time period, Dr. Jackson was placed on paid administrative leave. Under the agreement, WRAIR agreed to pay Dr. Jackson nine months worth of an unpaid salary in a lump sum and her

attorney's fees. In exchange, Dr. Jackson agreed to retire from the facility. (*Id.*) Subsequently, the settlement agreement was rejected by WRAIR.

Sometime before November 2002, Dr. Jackson wrote several letters to Senators Paul Sarbanes and Barbara Mikulski to inform them of an alleged "cover-up" and mismanagement of the Leishmaniasis program[1] at WRAIR. (Paper No. 55 Ex. 14) On April 10, 2002, Dr. Jackson was asked by her supervisor, Dr. Peter Weina, to "submit a written plan of action [by April 30, 2002 given the] impending dissolution of the WRAIR Leishmania Research Program at the end of Fiscal Year 2002. (Paper No. 46 Ex. 16) Dr. Weina reiterated his request to Dr. Jackson on April 25, 2002. (*Id.*)

On August 28, 2002, Dr. Weina notified WRAIR's Institutional Animal Care and Use Committee ("IACUC") of the concerns he had about Dr. Jackson modifying protocol COO2-00[2] without the required review and approval. (Paper No. 46 Ex. 10) The IACUC investigated Dr. Weina's concerns. The IACUC held a hearing and received testimony from Dr. Jackson, Dr. Weina and other WRAIR employees familiar with the protocol. (*Id.*) On November 14, 2002, the IACUC issued a final report. (*Id.*) The report contained both a majority and minority opinion. (*Id.*) Both the majority and

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[1] This program used canines to research and develop drugs to treat a complex, parasitic disease found in the Gulf War Region and Afghanistan, known as ["]leishmaniasis."

[2] The purpose of this protocol was to research a parasitic disease known as "leishmaniasis." Dogs, naturally infected with the disease, were the subjects of the study.

minority agreed that Dr. Jackson made "significant, multiple major modifications to the study design, without the benefit of an approved amendment addressing those modifications."[3] (*Id.*) The majority opinion recommended that: (1) the protocol be terminated; (2) all dogs in the study be euthanized; (3) Dr. Jackson write a final major amendment to terminate subject protocol; (4) Dr. Jackson be required to obtain animal care and use training through mandatory attendance of six IACUC meetings within the next year; and (5) no new protocols from Dr. Jackson be accepted for review or approval until the animal care and use training is completed. (*Id.*)

Dr. Jackson remained on paid administrative leave until April 2004.[4] When she returned to work, Dr. Jackson was temporarily assigned by Col. Donald Skillman to the Department of Entomology, Division of Communicable Diseases and Immunology. ("DCD&I") Dr. Jackson performed duties perhaps equivalent to those performed by a GS7-9, but her salary and title remained as it was before she was placed on administrative leave. (Paper No. 46 Ex. 14) Although the initial assignment was not to exceed 120 days, Dr. Jackson's assignment was extended three times, and ultimately lasted more than two years.

---

[3] The minority opinion considered Dr. Jackson's lack of compliance with established policy to be a serious error in professional judgment rather than a willful effort to subvert animal use policy.

[4] Dr. Jackson's salary did not change while she was on paid administrative leave. Her salary was more than $110,000 per year. (Paper No. 46 Ex. 1 at 137:15-17, 170:5-9)

In June 2006, Dr. Jackson sought to present her "own" research on data from four dogs involved in the COO2–00 study. (Paper No. 55 Ex. 6) Dr. Debra Yourick informed Dr. Jackson that she could not present the data "since there was a complete restriction on publication." (*Id.*) Dr. Jackson retired from WRAIR in September 2006. (Paper No. 46).

B. Procedural Background

Dr. Jackson filed an EEO complaint against WRAIR on February 21, 2001. When settlement negotiations failed in that case, Dr. Jackson reinstituted her complaint with the EEOC. Jackson later withdrew that claim with the EEOC and filed a discrimination claim based on age and gender, among other things, in federal court. Jackson's claim was dismissed by Judge Titus, and on appeal, the Fourth Circuit upheld the dismissal.

Jackson then filed another complaint with the EEOC. She also withdrew that claim with the EEOC and filed a complaint in this Court on April 3, 2007 for retaliation and injurious falsehoods during her employment as a Research Scientist with WRAIR. Jackson initially alleged that WRAIR discriminated against her by: (1) limiting her ability to publish her research and conduct further research; (2) demoting her to an inferior lab position and writing performance evaluations that were negative and inaccurate; and (3) defaming her to a prospective employer at Cornell University.

On August 3, 2007, Defendant filed a motion to dismiss or in the alternative a motion for summary judgment. On March 25, 2008, after brief-

ing by the parties, the Court granted Defendant's motion in part and denied it in part. The Court found that Dr. Jackson's claim for retaliation based on negative performance evaluations and delays in publishing failed and granted summary judgment to Defendant. The Court also granted summary judgment with respect to Dr. Jackson's claim for defamation. The Court, however, denied Defendant's motion for summary judgment regarding Dr. Jackson's claims for retaliation based on a "complete restriction" on her publication rights and her reassignment or demotion when she returned to WRAIR after being placed on paid administrative leave for sixteen months. After extensive discovery, Defendant renewed its motion for summary judgment. The Court held a telephonic hearing to allow the parties to argue their positions.

II. Standard of Review

Summary judgment is proper if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 302 (4th Cir. 2006). A material fact is one that "might affect the outcome of the suit under the governing law." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson*, 477 U.S. at 247-48 (emphasis in original). However, the nonmoving party "cannot

create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1986). The Court may only rely on facts supported in the record, not simply assertions in the pleadings, in order to fulfill its "affirmative obligation . . . to prevent 'factually unsupported claims or defenses' from proceeding to trial." *Felty v. Grave-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (citing *Celotex*, 477 U.S. at 323-24). When ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all *justifiable* inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255 (emphasis added).

III. Analysis

Rarely is a plaintiff able to establish intentional discrimination or retaliation by direct evidence. Absent direct evidence of retaliation, a plaintiff must first demonstrate by a preponderance of the evidence, a prima facie case of retaliation. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Once the plaintiff establishes a prima facie case of discrimination, the defendant has the burden of producing evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). Thereafter, the plaintiff may adduce evidence showing that the defendant's proffered reason was a mere pretext and that race was the real reason for the defendant's less favorable treatment of the plaintiff. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004). Although the evidentiary burden shifts back and

forth under the *McDonnell Douglas* framework, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff." *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

A. Retaliation Based on Restriction on Publication

To establish a prima facie case, Dr. Jackson must demonstrate that: (1) she engaged in a protected activity; (2)WRAIR took adverse employment actions against her; and (3) a causal connection existed between her protected activity and WRAIR's adverse actions. *See* 42 U.S.C. § 2000e, *et seq[.]* ("Title VII"). Dr. Jackson's main claim concerns the extensive research she performed for the Leishmaniasis program while employed by WRAIR. Dr. Jackson contends that WRAIR retaliated against her by permanently excluding her from publishing or disclosing her dog protocol research and "administratively reassigning her work to another scientist" because she engaged in a variety of protected activities between 2000 and 2004. (Paper No. 55) Although Dr. Jackson alleges six protected activities, her pleadings and exhibits primarily address two activities: (1) the EEO claims Dr. Jackson filed; and (2) Dr. Jackson's communication with Senators Sarbanes and Mikulski concerning alleged mismanagement of the Leishmaniasis Program. As these activities certainly constitute protected activities, Dr. Jackson has established the first prong of her prima facie case of retaliation.

Dr. Jackson states that the actions taken by WRAIR were adverse because "nothing is more harmful to a research scientist's career" than prohibiting her from publishing and thus receiving credit for work conducted over a 15 year period. (Paper No. 60). While the facts surrounding the COO2-00 protocol and Dr. Jackson's right to publish her research related to the protocol are clouded by Dr. Jackson's emotion, the Court agrees, in principal, that such actions would arguably be considered "adverse," and therefore finds that Dr. Jackson has tenuously established the second element of her prima facie case.

To establish a causal connection between a protected activity and the adverse action, "the temporal proximity must be 'very close.'" *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001). Stated another way, Dr. Jackson must demonstrate that WRAIR took the adverse employment action against her *because* she engaged in a protected activity. Dr. Jackson offers a scant amount of evidence that supports any causal connection between her protected activity and WRAIR's adverse action. In her pleadings, Dr. Jackson devotes the majority of her time and energy addressing her contention that another, less qualified research scientist, who never conducted or participated in the research, appropriated her work. During discovery, Dr. Jackson deposed this scientist, Brianna Skinner-Harris, at length. (Paper No. 55 Ex. 1) Question after question, Dr. Jackson tried to elicit testimony from Dr. Skinner-Harris to support her assertion that her superiors at WRAIR appropriated her work in an effort to claim it as their own. To Dr. Jackson, it is clear

that the restrictions on publication of the COO2-00 protocol and all of the related issues were caused by and due to her protected activities. But it is not clear to the Court. There is virtually no evidence to support a causal connection.

In fact, the uncontroverted evidence indicates that the restrictions were a result of Dr. Jackson's protocol violations as indicated in the November 14, 2002 IACUC report. In 2002, the IACUC found that Dr. Jackson made "significant, multiple major modifications to the study design, without the benefit of an approved amendment addressing those modifications." (Paper No. 46 Ex. 10) Among other things, the committee found that "whatever data had been generated [from the study], had been obtained outside the bounds of an IACUC-approved protocol," (Paper No. 46 Ex. 10 p. 8) and recommended that Dr. Jackson be required to obtain animal care and use training through mandatory attendance of six IACUC meetings within the next year; and that no new protocols from Dr. Jackson be accepted for review or approval until the animal care and use training is completed. (*Id.*) In 2006, Dr. Jackson wished to give a presentation at a symposium on her "own" research on four dogs in the COO2-00 protocol and inquired whether she could do so. (Paper No. 55 Ex. 6) Dr. Debra Yourick informed her that it was not possible since there was a "complete restriction on publication." (*Id.*) Since WRAIR found in 2002 that the COO2-00 data was obtained outside an IACUC-approved protocol, WRAIR sought only to restrict Dr. Jackson's publication rights with respect to the COO2-00 protocol. Moreover, Dr. Jackson admitted as much in her deposition. (Paper No. 46 Ex. 1 at 235:14-15)

She stated that the restriction "only has to do with the dog protocol" and acknowledged that the IACUC found that she violated the protocol. (*Id.*) Yet, in her pleadings, Dr. Jackson attempts to gloss over this fact and instead asserts that protocol violation was a way for WRAIR to lay claim to Dr. Jackson's work.

Dr. Jackson's numerous and emotionally charged allegations of impropriety related to the termination of the COO2-00 protocol and alleged "taking" of her research fail to demonstrate to the Court any causal connection between Dr. Jackson's protected activities and the restrictions placed on publication of the COO2-00 protocol. It is also worth noting that in 2004, after Dr. Jackson's engaged in protected activities, Dr. Jackson submitted and her supervisors approved four different documents, unrelated to the COO2-00 protocol, for publication. (Paper No. 46 Ex. 1 and 3) This undisputed fact further undermines Dr. Jackson's assertion. Thus, the Court finds Dr. Jackson has failed to establish the third element her prima facie case. However, even were the Court to somehow find a causal connection between Dr. Jackson's protected activity and the adverse action taken against her, Defendant has certainly established a legitimate non-discriminatory reason for restricting Dr. Jackson's opportunity to publish any data in connection with the COO2-00 protocol. Thus, the Court will grant Defendant's motion for summary judgment with respect to this portion of Dr. Jackson's claim for retaliation.

B. Retaliation Based on Dr. Jackson's Reassignment/Demotion

In April 2004, Dr. Jackson returned to work at WRAIR after being on paid administrative leave since November 2002. Upon her return, Dr. Jackson was temporarily assigned by Col. Donald Skillman to the DCD&I. Dr. Jackson performed duties perhaps equivalent to those performed by a GS7-9, but her salary and title remained as it was before she was placed on administrative leave. (Paper No. 46 Ex. 14) Although the initial assignment was not to exceed 120 days, Dr. Jackson's assignment was extended three times, and ultimately lasted more than two years. While Dr. Jackson contends that this was a "demotion" in retaliation for her protected activities, Defendant maintains that the change was a "detail assignment." Defendant submits that a "detail assignment is not automatically actionable,["] but rather "should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Burlington N. & Santa Fe Ry. Co. v.White*, 548 U.S. 53, 71 (2006).

Considering all the circumstances, the Court does not find that the Dr. Jackson was "demoted" upon her return to WRAIR in 2004. Her title and salary remained as it was before she went on leave, and the funding for the leishmaniasis research ended at the end of Fiscal Year 2002. The record supports that as early as April 2002, Dr. Jackson was aware that the funding for the leishmaniasis research would not continue. (Paper No. 46 Ex. 16 and 17) Yet, Dr. Jackson implores the Court to find that the lack of funding was a

pretext for discrimination. (Paper No. 55) Defendant also argues and the record supports that Col. Skillman, the person who assigned Dr. Jackson to the temporary detail, had little or no knowledge about Dr. Jackson's protected activities, (Paper No. 6 Ex. 1) and in her deposition, Dr. Jackson admitted that she "had very little [or virtually no] interaction with Col. Skillman." (Paper No. 46 Ex. 1) Dr. Jackson clearly was insulted by the detail and considered the work beneath a scientist of her background and experience, but that is not enough to support her burden. The detail assignment was neither materially adverse nor was there any causal connection between Dr. Jackson's protected activities and the detail assignment made by Col. Skillman. Thus, the Court will grant Defendant's motion for summary judgment with respect to this portion of Dr. Jackson's claim for retaliation as well.

IV. Conclusion

For all the foregoing reasons, the Court will GRANT Defendants' Motion for Summary Judgment and DENY Plaintiff's Cross-Motion for Summary Judgment. An Order consistent with this Opinion will follow.

November 14, 2008
Date

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

JOAN E. JACKSON,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. AW-07-851
THE HONORABLE	)	
PETER GEREN,	)	
Acting Secretary,	)	
Dept. of the Army,	)	
Defendant.	)	

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ORDER

Pro se Plaintiff Joan E. Jackson has four motions currently pending before this Court: (1) Motion (Request) for an Injunction (Doc. No. 17); (2) Motion for Reconsideration (Doc. No. 18); (3) Motion to Reconsideration (Doc. No. 20); and (4) Motion (Request) for Witness Subpoenas (Doc. No. 23). The Court will briefly address each motion below.

With respect to Plaintiff's request for a permanent injunction, the Court does not believe that Plaintiff has presented sufficient grounds for such relief. Plaintiff seeks an injunction to preclude "possible" further retaliatory harm; however, the only noted example of prior "irreparable retaliatory harm" was an alleged phone call made in October 2002, over five and a half years ago, to Professor Steve Barr, DVM, Ph.D., at Cornell University Col-

lege of Veterinary Medicine, in which Plaintiff's former supervisor threatened to file animal protocol violations against Dr. Barr if he were to collaborate with Plaintiff. While Plaintiff notes that there are "many" examples or such retaliatory harm, Plaintiff has failed to provide the Court with those "many" examples or even state other incidents of alleged irreparable harm to her reputation. Thus, Plaintiff's reference to an incident that occurred well over five years ago, without more, is1 not sufficient to support the issuance of a permanent injunction. Therefore, the Court, at this time, will deny such request.

The Court will also deny Plaintiff's motions for reconsideration. A court may grant a motion for reconsideration under Fed. R. Civ. P. Rule 60(b) in limited circumstances where equity requires reconsideration. *See generally* 11 Wright, Miller & Kane, Federal Practice and Procedure § 2857 (2d ed. 1995). Because Rule 60 is an extraordinary remedy, "a motion to reconsider is not a license to reargue the merits or present new evidence." *Royal Ins. Co. of Am. v. Miles & Stockbridge*, P.C., 142 F. Supp. 2d 676, 677-78 n.1 (D. Md. 2001). As a result, reconsideration is warranted only because of: (1) a change in controlling law; (2) the availability of new evidence; or (3) the need to correct a clear error or prevent manifest injustice." *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005); *Potter v. Potter*, 199 F.R.D. 550, 552 (D. Md. 2001) (internal citations omitted). Plaintiff does not direct the Court's attention to any intervening changes in the controlling law and does not present any new evidence that was previously unavailable. Upon thorough consideration of the pending Motion for Reconsideration,

and the authority offered in support of it, the Court does not believe that its ruling was in error or that Plaintiff has presented any new information, either factual or legal, which warrants a modification of the ruling.

Additionally, the Court will deny Plaintiff's request for witness subpoenas. Considering that this litigation is still in the discovery stage, and that the deadline for the parties to file dispositive motions had not yet approached, the Court believes that Plaintiff's request is too premature. Therefore, the court will deny the request for witness subpoenas, without prejudice, reserving the right for Plaintiff to re-file this motion when timely associated with her need for witness subpoenas. Accordingly, IT IS this **20th day of May, 2008**, by the United States District Court for the District of Maryland, hereby **ORDERED**:

1. That Plaintiff's Motion (Request) for an Injunction (Doc. No. 17) BE, and the same hereby IS, **DENIED**;

2. That Plaintiff's Motion to Reconsider (Doc. No. 18) BE, and the same hereby IS, **DENIED**;

3. That Plaintiff's Motion to Reconsider (Doc. No. 20) BE, and the same hereby IS, **DENIED**;

4. That Plaintiff's Motion (Request) for Witness Subpoenas (Doc. No. 23) BE, and the same hereby IS, **DENIED**; AND

5. That the Clerk of the Court transmit a copy of this Order to all counsel and parties of record and mail a copy to pro se Plaintiff.

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
CASE NO. 09-1081

In re:	) Notice of Intent to File a
JOAN E. JACKSON	) Petition for a Writ of
Petitioner	) Certiorari to the United
v.	) States Supreme Court
THE HONORABLE	) re Petition Denied for
PETER GEREN,	) Rehearing and Rehear-
SECRETARY,	) ing En Banc of Fourth
DEPT. OF THE ARMY	) Circuit Appeal No.
Respondent	) 09-1081 of Order from
v.	) Civil Action No.
BRIANNA	) AW-07-00851 in the
SKINNER-HARRIS	) District Court of the
Respondent [Movant]	) United States The
	) District of Maryland
	) Southern Division
	)

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Notice of Intent to File a Petition for a Writ of Certiorari to the United States Supreme Court and Petition for Stay of the Mandate of the Fourth Circuit Court of Appeals Pending Final Determination

1. To Respondents in re the case above, to include The Honorable Peter Geren, Secretary of the Army, and Brianna Skinner-Harris: You will please take notice of Petitioner's intent to file a petition that a writ of certiorari issue for the United States Supreme Court to review the judgment of the United States Court of Appeals for the Fourth Circuit to deny rehearing and deny rehearing *en banc* of order from civil action No. AW-07-00851 in the District Court of the United States District of Maryland Southern Division, entered in the above case on July 21, 2009. 28 U.S.C.A. § 1254(1); 28 U.S.C.A. § 1651. A copy of said notice is served by certified mail signature indicating receipt requested.

2. Petitioner also, hereby, respectfully petitions for a stay of the mandate of the Fourth Circuit Court of Appeals pending their final determination, and for such other and further relief as may be just and proper. Federal Rules of Appellate Procedure 41(d)(2).

Respectfully submitted this 30th day of July 2009,

/s/ Joan E. Jackson
Joan E. Jackson, Petitioner Pro Se
P.O. Box 1505
Onset, Massachusetts 02558-1505
Email: jacksonall@aol.com
Cell Phone: 301-661-9002

CERTIFICATE OF SERVICE

Joan E. Jackson, PhD, *Pro Se* Petitioner, does hereby certify that Respondents have been served a complete and accurate copy of "Notice of Intent to File a Petition for a Writ of Certiorari to the United States Supreme Court and Petition for Stay of the Mandate of the Fourth Circuit Court of Appeals Pending Final Determination," by placing a certified mail –"Restricted Delivery" with signature return receipt in the United States mail, sufficient first class postage affixed and addressed as follows:

Clerk of the Court, Attn: Ms. Pamela Stump
United States Court of Appeals, Fourth Circuit
U.S. Courthouse Annex, Fifth Floor
1100 East Main Street
Richmond, Virginia 23219
PH: 804-916-2700

And

Mr. Alex S. Gordon, Esq.
[NTC Government]
Office of the United States Attorney
36 South Charles Street, Fourth Floor
Baltimore, Maryland 21201
Fax No.:410-962-9947
PH: 410-209-4800

And

Ms. Nefertara Clark, Esq.
[NTC Dr. Skinner-Harris, DVM]
8 North Oliver Street
Elberton, Georgia 30635
PH: 706-283-9732

Dated this 30th day of July 2009.

/s/ Joan E. Jackson
Dr. Joan E. Jackson, PhD,
Pro Se Petitioner
P.O. Box 1505
Onset, Massachusetts 02558-1505
Cell Phone: 301-661-9002
Email: jacksonall@aol.com

AFFIDAVIT FOR NOTICE OF INTENTION TO APPLY FOR WRIT OF CERTIORARI

Joan E. Jackson, petitioner *pro se*, under penalty of perjury states:

1. She is the *pro se* plaintiff and appellant in the above-numbered and entitled cause, and petitioner in this notice of intent to petition for a writ of certiorari.

2. Petitioner, *pro se*, in accordance with the rules of this Honorable Court and the laws of this state, hereby gives notice of her intention to petition the United States Supreme Court for a writ of certiorari in this case, such being addressed to the Respondents, by their attorneys of record for the Honorable Peter Geren, Secretary of the Army, original defendant/respondent, and Brianna Skinner-Harris, movant/respondent, respectively; and also herewith respectfully petitions for stay of The Fourth Circuit Court of Appeals' mandate in the above case pending outcome of these petitions.

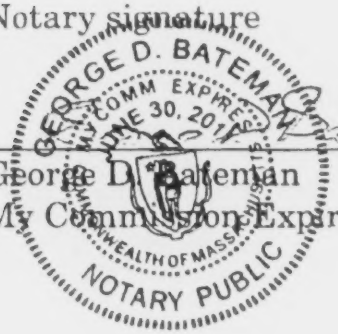
3. Affiant further declares under penalty of perjury that all averments made in this affidavit and in the above notice of intent to file said petitions are to my best knowledge true and correct.

Dated: 30 July 2009.

/s/ Joan E. Jackson
Joan E. Jackson, Petitioner *pro se*
P.O. Box 1505
Onset, Massachusetts 02558-1505
Email: jacksonall@aol.com
Cell phone: 301-661-9002

Signed before me this day twenty-fourth day of December 2009

Notary signature



George D. Bateman
My Commission Expires: June 30, 2011

- **42 C.F.R. §§ 50 and 93 (May 17, 2005)**

[NOTE: The pertinent section of this regulation was reproduced in the text body of the petition so is not given again here.]

- **Department of Defense Directive, No. 32162 (2003).**

§4.8 Research Misconduct.

All DoD Components shall establish procedures to monitor and review the ethical conduct of research. The DoD Components that conduct or support research shall ensure that data and data collection are conducted in an ethical manner. In cases in which data are not collected in an appropriate manner, the DoD Component shall determine if the misconduct was intentional or reckless; was an isolated event or part of a pattern; had significant impact on the research record; or had significant impact on other researchers or institutions. The DoD Component shall initiate and carry through on any actions that are necessary to ensure resolution of misconduct findings. All findings of serious research misconduct under this section shall be reported to the Director, Defense Research and Engineering.

Supreme Court, U.S.
FILED

OCT 21 2009

OFFICE OF THE CLERK

No. 10-71

IN THE

Supreme Court of the United States

JOAN E. JACKSON,

Petitioner,

v.

*THE HONORABLE JOHN MCHUGH,
SECRETARY OF THE ARMY,
[THE HONORABLE PETER GEREN,
SECRETARY OF THE ARMY,]

Respondent,

v.

BRIANNA SKINNER-HARRIS,

Movant.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

Joan E. Jackson
Petitioner *Pro Se*
P.O. Box 1505
Onset, Massachusetts 02558-1501
Telephone: 301-661-9002

* Sept. 21, 2009 Appointment.

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APPENDIX B

A COOPERATIVE RESEARCH AND DEVELOPMENT AGREEMENT FOR DRUG DISCOVERY AND BIODIVERSITY CONSERVATION IN AFRICA

[selected sections re Quest. Presented II]

[Original in Exhibit 6, Dist. Ct. Dkt. 60, signed by "Authorized Business Official," Director, Walter Reed Army Institute of Research, Col. August J. Salvado, on 21 July 1994 [page 9], and Petitioner, as Associate Program Leader [page 10]; and both signed on "Statement of Intent To Establish a Consortium Agreement" [unnumbered page 12]; *see* §§ 8.04 Exhibit 6 [Dkt. 60] and 11.6 [page A-10, Exhibit 3, Dkt. 25] stating: "*patent rights, data and publication, and liability shall survive the termination or expiration of this agreement...*" (emphasis added); both latter sections copied below.]

Article 1. Background

1.00 This agreement is entered into under the authority of the Federal Technology Transfer Act of 1986, 15 U.S.C. 3710a, *et seq.*, between the signatory parties to this Agreement, and is in furtherance of the International Cooperative Biodiversity Groups (ICBG) Program jointly sponsored by the Fogarty International Center of the National Institutes of Health, the National Science Foundation and the United States Agency for International Development.

1.02 The members of the ICBG entitled "Drug Development and Conservation of Biodiversity in West and Central Africa" desire to enter into an agreement in which Intellectual Property of the ICBG is properly protected, utilized, and compensated...

2.03 "Subject Data" means all recorded information first produced in the performance of this Agreement, including the following which are provided as examples and not intended as limitations: species inventories, ethnobiology, phytochemistry, drug development data, and published works, catalogues, and databases referring to such information produced or compiled as part of the activities of the members of the ICBG.

2.04 "Intellectual Property Rights of the ICBG" (IPR) means any and all rights relating to natural products, processes and information regarding natural products discovered, obtained or invented in the course of activities of the parties in furtherance of this Agreement, and includes but is not limited to, for example: utility patents, plant breeder patents, petty patents, trade secrets, copyright, trademark. IPR includes any other statutory or common law or traditional rights, other than real property and personal property, which may be obtained or enforced in any legal jurisdiction of the world.

4.01 Title to IPR. The WRAIR agrees to manage all IPR consistent with its agreement with Fogarty International Center and this Agreement, specifically the royalty sharing provisions contained in Article 4.03 below...

4.03 Royalty Sharing

4.03.1 Twenty percent (20%) of all royalty and other considerations generated from licenses of IPR shall be equitably divided among those parties contributing intellectually to the creation of the IPR taking into account their relative contribution and ensuring that the inventors in each case receive not less than fifteen percent (15%).

4.03.2 Fifty percent (50%) of all royalty income and other considerations generated from licenses of IPR shall be donated to the Bioresurces Development and Conservation Program (BDCP). All royalty income generated from licenses of IPR and donated to the BDCP shall be used by BDCP solely for programs and projects designed to promote sustainable economic development relating to biodiversity conservation in Nigeria and Cameroon. An independent Trust Fund shall be established as outlined in the attached Compensation and Benefit Sharing Plan for this purpose. [See, last four pages Exhibit 6 Dkt. 60, the BDCP Trust Fund was established.]

4.03.3 Thirty percent (30%) of all royalty income and other considerations generated from licenses of IPR shall be donated to a Tropical Disease Drug Development Program based in WRAIR to be used exclusively for development of tropical disease drugs.

4.08 Copyright. Copyright in works by the parties and compilations of information, including catalogues and databases, by the parties shall be

protected by use of copyright notices and registration, where appropriate.

8.04 The rights and duties specified in provisions of this Agreement covering Intellectual Property Rights, Subject Data, Proprietary Information, Royalty-Sharing, and Liability –No Warranty shall survive the termination or expiration of this Agreement.

APPENDIX C

Constitutional and Statutory Provisions

- **U.S. Const. art. III, § 2, cl. 1-2:**

The judicial power [of one supreme Court] shall extend to all Cases, in law and equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority;...-to controversies to which the United States shall be a party;...In all other cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to law and fact...

- **U.S. Const. amend. I:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- **U.S. Const. amend. V:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb; nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- **U.S. Const. amend. XIV, § 1:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Unites States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- **Freedom of Information Act, 5 U.S.C. § 552 (2009).**

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agen-

cy may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of lo-

cating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to--

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A

publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any

part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[**(D)** Repealed. Pub.L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall--

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except--

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits

prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with

another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records--

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure--

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means--

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall--

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including--

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and pro-

cedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests,

based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency--

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the

date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median

number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is is-

sued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes--

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall--

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency--

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

- **Administrative Procedure Act of 1993, 5 U.S.C. § 706 (2009).**

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

- **Federal Technology Transfer Act of 1986, 15 U.S.C. §§ 3710(a) and 3710a (2009).**

§ 3710. Utilization of Federal technology

(a) Policy

(1) It is the continuing responsibility of the Federal Government to ensure the full use of the results of the Nation's Federal investment in research and development. To this end the Federal Government shall strive where appropriate to transfer federally owned or originated technology to State and local governments and to the private sector.

(2) Technology transfer, consistent with mission responsibilities, is a responsibility of each laboratory science and engineering professional.

(3) Each laboratory director shall ensure that efforts to transfer technology are considered positively in laboratory job descriptions, employee promotion policies, and evaluation of the job performance of scientists and engineers in the laboratory....

§ 3710a. Cooperative research and development agreements

(a) General authority

Each Federal agency may permit the director of any of its Government-operated Federal laboratories, and, to the extent provided in an agency-approved joint work statement or, if permitted by the agency, in an agency-approved annual strategic plan, the director of any of its Government-owned, contractor-operated laboratories--

(1) to enter into cooperative research and development agreements on behalf of such agency (subject to subsection (c) of this section) with other Federal agencies; units of State or local government; industrial organizations (including corporations, partnerships, and limited partnerships, and industrial development organizations); public and private foundations; nonprofit organizations (including universities); or other persons (including licensees of inventions owned by the Federal agency); and

(2) to negotiate licensing agreements under section 207 of Title 35, or under other authorities (in the case of a Government-owned, contractor-operated laboratory, subject to subsection (c) of this section) for inventions made or other intellectual property developed at the laboratory and other inventions or other intellectual property that may be voluntarily assigned to the Government.

(b) Enumerated authority

(1) Under an agreement entered into pursuant to subsection (a)(1) of this section, the laboratory may grant, or agree to grant in advance, to a collaborating party patent licenses or assignments, or options thereto, in any invention made in whole or in part by a laboratory employee under the agreement, or, subject to section 209 of Title 35, may grant a license to an invention which is federally owned, for which a patent application was filed before the signing of the agreement, and directly within the scope of the work under the agreement, for reasonable compensation when appropriate. The laboratory shall ensure, through such agreement, that the collaborating party has the option to choose an exclusive license for a pre-negotiated field of use for any such invention under the agreement or, if there is more than one collaborating party, that the collaborating parties are offered the option to hold licensing rights that collectively encompass the rights that would be held under such an exclusive license by one party. In consideration for the Government's contribution under the agreement, grants under this paragraph shall be subject to the following explicit conditions:

(A) A nonexclusive, nontransferable, irrevocable, paid-up license from the collaborating party to the laboratory to practice the invention or have the invention practiced throughout the world by or on behalf of the Government. In the exercise of such license, the Government shall not publicly disclose trade secrets or commercial or financial information that is privileged or confidential within the meaning of section 552(b)(4) of Title 5 or

which would be considered as such if it had been obtained from a non-Federal party.
(B) If a laboratory assigns title or grants an exclusive license to such an invention, the Government shall retain the right--

(i) to require the collaborating party to grant to a responsible applicant a nonexclusive, partially exclusive, or exclusive license to use the invention in the applicant's licensed field of use, on terms that are reasonable under the circumstances; or

(ii) if the collaborating party fails to grant such a license, to grant the license itself.

(C) The Government may exercise its right retained under subparagraph (B) only in exceptional circumstances and only if the Government determines that--

(i) the action is necessary to meet health or safety needs that are not reasonably satisfied by the collaborating party;

(ii) the action is necessary to meet requirements for public use specified by Federal regulations, and such requirements are not reasonably satisfied by the collaborating party; or

(iii) the collaborating party has failed to comply with an agreement containing provisions described in subsection (c)(4)(B) of this section.

This determination is subject to administrative appeal and judicial review under section 203(2) of Title 35.

(2) Under agreements entered into pursuant to subsection (a)(1) of this section, the laboratory shall ensure that a collaborating party may retain title to any invention made solely by its employee in exchange for normally granting the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice the invention or have the invention practiced throughout the world by or on behalf of the Government for research or other Government purposes.

(3) Under an agreement entered into pursuant to subsection (a)(1) of this section, a laboratory may--

(A) accept, retain, and use funds, personnel, services, and property from a collaborating party and provide personnel, services, and property to a collaborating party;

(B) use funds received from a collaborating party in accordance with subparagraph (A) to hire personnel to carry out the agreement who will not be subject to full-time-equivalent restrictions of the agency;

(C) to the extent consistent with any applicable agency requirements or standards of conduct, permit an employee or former employee of the laboratory to participate in an effort to commercialize an invention made by the employee or former employee while in the employment or service of the Government; and

(D) waive, subject to reservation by the Government of a nonexclusive, irrevocable, paid-up license to practice the invention or have the invention practiced throughout the world by or on behalf of the Government, in advance, in whole or in part, any right of ownership which the Federal Government may have to any subject invention made under the agreement by a collaborating party or employee of a collaborating party.

(4) A collaborating party in an exclusive license in any invention made under an agreement entered into pursuant to subsection (a)(1) of this section shall have the right of enforcement under chapter 29 of Title 35.

(5) A Government-owned, contractor-operated laboratory that enters into a cooperative research and development agreement pursuant to subsection (a)(1) of this section may use or obligate royalties or other income accruing to the laboratory under such agreement with respect to any invention only--

(A) for payments to inventors;

(B) for purposes described in clauses (i), (ii), (iii), and (iv) of section 3710c(a)(1)(B) of this title; and

(C) for scientific research and development consistent with the research and development missions and objectives of the laboratory.

(6)(A) In the case of a laboratory that is part of the National Nuclear Security Administration, a designated official of that Administration may waive any

license retained by the Government under paragraph (1)(A), (2), or (3)(D), in whole or in part and according to negotiated terms and conditions, if the designated official finds that the retention of the license by the Government would substantially inhibit the commercialization of an invention that would otherwise serve an important national security mission.

(B) The authority to grant a waiver under subparagraph (A) shall expire on the date that is five years after October 30, 2000. The expiration under the preceding sentence of authority to grant a waiver under subparagraph (A) shall not affect any waiver granted under that subparagraph before the expiration of such authority.

(C) Not later than February 15 of each year, the Administrator for Nuclear Security shall submit to Congress a report on any waivers granted under this paragraph during the preceding year.

(c) Contract considerations

(1) A Federal agency may issue regulations on suitable procedures for implementing the provisions of this section; however, implementation of this section shall not be delayed until issuance of such regulations.

(2) The agency in permitting a Federal laboratory to enter into agreements under this section shall be guided by the purposes of this chapter.

(3)(A) Any agency using the authority given it under subsection (a) of this section shall review stan-

dards of conduct for its employees for resolving potential conflicts of interest to make sure they adequately establish guidelines for situations likely to arise through the use of this authority, including but not limited to cases where present or former employees or their partners negotiate licenses or assignments of titles to inventions or negotiate cooperative research and development agreements with Federal agencies (including the agency with which the employee involved is or was formerly employed).

(B) If, in implementing subparagraph (A), an agency is unable to resolve potential conflicts of interest within its current statutory framework, it shall propose necessary statutory changes to be forwarded to its authorizing committees in Congress.

(4) The laboratory director in deciding what cooperative research and development agreements to enter into shall--

(A) give special consideration to small business firms, and consortia involving small business firms; and

(B) give preference to business units located in the United States which agree that products embodying inventions made under the cooperative research and development agreement or produced through the use of such inventions will be manufactured substantially in the United States and, in the case of any industrial organization or other person subject to the control of a foreign company or government, as appropriate, take into consideration whether or not such foreign government

permits United States agencies, organizations, or other persons to enter into cooperative research and development agreements and licensing agreements.

(5)(A) If the head of the agency or his designee desires an opportunity to disapprove or require the modification of any such agreement presented by the director of a Government-operated laboratory, the agreement shall provide a 30- day period within which such action must be taken beginning on the date the agreement is presented to him or her by the head of the laboratory concerned.

(B) In any case in which the head of an agency or his designee disapproves or requires the modification of an agreement presented by the director of a Government-operated laboratory under this section, the head of the agency or such designee shall transmit a written explanation of such disapproval or modification to the head of the laboratory concerned.

(C)(i) Any non-Federal entity that operates a laboratory pursuant to a contract with a Federal agency shall submit to the agency any cooperative research and development agreement that the entity proposes to enter into and the joint work statement if required with respect to that agreement.

(ii) A Federal agency that receives a proposed agreement and joint work statement under clause (i) shall review and approve, request specific modifications to, or disapprove the proposed agreement and joint work statement within 30 days after such submission. No agreement may be entered into by a Government-owned, contractor-operated laboratory

under this section before both approval of the agreement and approval of a joint work statement under this clause.

(iii) In any case in which an agency which has contracted with an entity referred to in clause (i) disapproves or requests the modification of a cooperative research and development agreement or joint work statement submitted under that clause, the agency shall transmit a written explanation of such disapproval or modification to the head of the laboratory concerned.

(iv) Any agency that has contracted with a non-Federal entity to operate a laboratory may develop and provide to such laboratory one or more model cooperative research and development agreements for purposes of standardizing practices and procedures, resolving common legal issues, and enabling review of cooperative research and development agreements to be carried out in a routine and prompt manner.

(v) A Federal agency may waive the requirements of clause (i) or (ii) under such circumstances as the agency considers appropriate.

(6) Each agency shall maintain a record of all agreements entered into under this section.

(7)(A) No trade secrets or commercial or financial information that is privileged or confidential, under the meaning of section 552(b)(4) of Title 5, which is obtained in the conduct of research or as a result of activities under this chapter from a non-Federal

party participating in a cooperative research and development agreement shall be disclosed.

(B) The director, or in the case of a contractor-operated laboratory, the agency, for a period of up to 5 years after development of information that results from research and development activities conducted under this chapter and that would be a trade secret or commercial or financial information that is privileged or confidential if the information had been obtained from a non-Federal party participating in a cooperative research and development agreement, may provide appropriate protections against the dissemination of such information, including exemption from subchapter II of chapter 5 of Title 5.

(d) Definitions

As used in this section--

(1) the term "cooperative research and development agreement" means any agreement between one or more Federal laboratories and one or more non-Federal parties under which the Government, through its laboratories, provides personnel, services, facilities, equipment, intellectual property, or other resources with or without reimbursement (but not funds to non-Federal parties) and the non-Federal parties provide funds, personnel, services, facilities, equipment, intellectual property, or other resources toward the conduct of specified research or development efforts which are consistent with the missions of the laboratory; except that such term does not include a procurement contract or cooperative agreement as

those terms are used in sections 6303, 6304, and 6305 of Title 31;

(2) the term "laboratory" means--

(A) a facility or group of facilities owned, leased, or otherwise used by a Federal agency, a substantial purpose of which is the performance of research, development, or engineering by employees of the Federal Government;

(B) a group of Government-owned, contractor-operated facilities (including a weapon production facility of the Department of Energy) under a common contract, when a substantial purpose of the contract is the performance of research and development, or the production, maintenance, testing, or dismantlement of a nuclear weapon or its components, for the Federal Government; and

(C) a Government-owned, contractor-operated facility (including a weapon production facility of the Department of Energy) that is not under a common contract described in subparagraph (B), and the primary purpose of which is the performance of research and development, or the production, maintenance, testing, or dismantlement of a nuclear weapon or its components, for the Federal Government, but such term does not include any facility covered by Executive Order No. 12344, dated February 1, 1982, pertaining to the naval nuclear propulsion program;

(3) the term "joint work statement" means a proposal prepared for a Federal agency by the director of a Government-owned, contractor-operated laboratory describing the purpose and scope of a proposed cooperative research and development agreement, and assigning rights and responsibilities among the agency, the laboratory, and any other party or parties to the proposed agreement; and

(4) the term "weapon production facility of the Department of Energy" means a facility under the control or jurisdiction of the Secretary of Energy that is operated for national security purposes and is engaged in the production, maintenance, testing, or dismantlement of a nuclear weapon or its components.

(e) Determination of laboratory missions

For purposes of this section, an agency shall make separate determinations of the mission or missions of each of its laboratories.

(f) Relationship to other laws

Nothing in this section is intended to limit or diminish existing authorities of any agency.

(g) Principles

In implementing this section, each agency which has contracted with a non-Federal entity to operate a laboratory shall be guided by the following principles:

(1) The implementation shall advance program missions at the laboratory, including any national security mission.

(2) Classified information and unclassified sensitive information protected by law, regulation, or Executive order shall be appropriately safeguarded.

- **17 U.S.C. § 105 (2009).**

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving or holding copyrights transferred to it by assignment, bequest, or otherwise.

- **18 U.S.C. § 208 (2009).**

§ 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judi-

cial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest--

Shall be subject to the penalties set forth in section 216 of this title.

(b) Subsection (a) shall not apply--

(1) if the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee;

(2) if, by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all officers and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too

remote or too inconsequential to affect the integrity of the services of the Government officers or employees to which such regulation applies;

(3) in the case of a special Government employee serving on an advisory committee within the meaning of the Federal Advisory Committee Act (including an individual being considered for an appointment to such a position), the official responsible for the employee's appointment, after review of the financial disclosure report filed by the individual pursuant to the Ethics in Government Act of 1978, certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the financial interest involved; or

(4) if the financial interest that would be affected by the particular matter involved is that resulting solely from the interest of the officer or employee, or his or her spouse or minor child, in birthrights-

(A) in an Indian tribe, band, nation, or other organized group or community, including any Alaska Native village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,

(B) in an Indian allotment the title to which is held in trust by the United States or which is inalienable by the allottee without the consent of the United States, or

(C) in an Indian claims fund held in trust or administered by the United States,

if the particular matter does not involve the Indian allotment or claims fund or the Indian tribe, band, nation, organized group or community, or Alaska Native village corporation as a specific party or parties.

(c)(1) For the purpose of paragraph (1) of subsection (b), in the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be deemed to be the Government official responsible for appointment.

(2) The potential availability of an exemption under any particular paragraph of subsection (b) does not preclude an exemption being granted pursuant to another paragraph of subsection (b).

(d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.

(2) The Office of Government Ethics, after consultation with the Attorney General, shall issue uniform regulations for the issuance of waivers and exemptions under subsection (b) which shall--

(A) list and describe exemptions; and

(B) provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.

- **18 U.S.C. § 209 (2009).**

§ 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, makes any contribution to, or in any way supplements, the salary of any such officer or employee under circumstances which would make its receipt a violation of this subsection--

Shall be subject to the penalties set forth in section 216 of this title.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of chapter 41 of title 5.

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: *Provided*, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days or, in the case of participants in overseas assignments, in excess of three hundred and sixty-five days.

(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and which is exempt from taxation under section 501(a) of such Code.

(g)(1) This section does not prohibit an employee of a private sector organization, while assigned to an agency under chapter 37 of title 5, from continuing to receive pay and benefits from such organization in accordance with such chapter.

(2) For purposes of this subsection, the term "agency" means an agency (as defined by section 3701 of title 5) and the Office of the Chief Technology Officer of the District of Columbia.

(h) This section does not prohibit a member of the reserve components of the armed forces on active duty pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10 from receiving from any person that employed such member before the call or order to active duty any payment of any part of the salary or wages that such person would have paid the member if the member's employment had not been interrupted by such call or order to active duty.

- **28 U.S.C. § 1254(1):**

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

- **28 U.S.C. § 1291 (2009)**
Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

- **35 U.S.C. § 102.**

§ 102. Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless--

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

(c) he has abandoned the invention, or

(d) the invention was first patented or caused to be patented, or was the subject of an inventor's certificate, by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application for patent or inventor's certificate filed more than twelve months before the filing of the application in the United States, or

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an interna-

tional application filed under the treaty defined in section 351(a) shall have the effects for the purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language; [FN1] or

(f) he did not himself invent the subject matter sought to be patented, or

(g)(1) during the course of an interference conducted under section 135 or section 291, another inventor involved therein establishes, to the extent permitted in section 104, that before such person's invention thereof the invention was made by such other inventor and not abandoned, suppressed, or concealed, or (2) before such person's invention thereof, the invention was made in this country by another inventor who had not abandoned, suppressed, or concealed it. In determining priority of invention under this subsection, there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

[FN1] So in original. The semicolon probably should be a comma.

- **Bayh Dole Act, 35 U.S.C. §§ 200-212 (2009).**

§ 200. Policy and objective

It is the policy and objective of the Congress to use the patent system to promote the utilization of inventions arising from federally supported research or development; to encourage maximum participation of small business firms in federally supported research and development efforts; to promote collaboration between commercial concerns and nonprofit organizations, including universities; to ensure that inventions made by nonprofit organizations and small business firms are used in a manner to promote free competition and enterprise without unduly encumbering future research and discovery; to promote the commercialization and public availability of inventions made in the United States by United States industry and labor; to ensure that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions; and to minimize the costs of administering policies in this area.

§ 207. Domestic and foreign protection of federally owned inventions

(a) Each Federal agency is authorized to--

(1) apply for, obtain, and maintain patents or other forms of protection in the United States and in foreign countries on inventions in which the Federal Government owns a right, title, or interest;

(2) grant nonexclusive, exclusive, or partially exclusive licenses under federally owned inventions, royalty-free or for royalties or other consideration, and on such terms and conditions, including the grant to the licensee of the right of enforcement pursuant to the provisions of chapter 29 of this title as determined appropriate in the public interest;

(3) undertake all other suitable and necessary steps to protect and administer rights to federally owned inventions on behalf of the Federal Government either directly or through contract, including acquiring rights for and administering
royalties to the Federal Government in any invention, but only to the extent the party from whom the rights are acquired voluntarily enters into the transaction, to facilitate the licensing of a federally owned invention; and

(4) transfer custody and administration, in whole or in part, to another Federal agency, of the right, title, or interest in any federally owned invention.

(b) For the purpose of assuring the effective management of Government-owned inventions, the Secretary of Commerce is authorized to--

(1) assist Federal agency efforts to promote the licensing and utilization of Government-owned inventions;

(2) assist Federal agencies in seeking protection and maintaining inventions in foreign countries, including the payment of fees and costs connected therewith; and

(3) consult with and advise Federal agencies as to areas of science and technology research and development with potential for commercial utilization.

- **Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (2009).**

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any no-

tice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in

the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal

employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such

department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.. [FN1]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e-5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.

§ 2000e-16a. Short title; purpose; definition

(a) Short title

Sections 2000e-16a to 2000e-16c of this title may be cited as the "Government Employee Rights Act of 1991".

(b) Purpose

The purpose of sections 2000e-16a to 2000e-16c of this title is to provide procedures to protect the rights of certain government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

(c) "Violation" defined

For purposes of sections 2000e-16a to 2000e-16c of this title, the term "violation" means a practice that violates section 2000e-16b(a) of this title.

§ 2000e-16b. Discriminatory practices prohibited

(a) Practices

All personnel actions affecting the Presidential appointees described in section 1219 of Title 2 or the State employees described in section 2000e-16c of this title shall be made free from any discrimination based on--

(1) race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title;

(2) age, within the meaning of section 633a of Title 29; or

(3) disability, within the meaning of section 791 of Title 29 and sections 12112 to 12114 of this title.

(b) Remedies

The remedies referred to in sections 1219(a)(1) of Title 2 and 2000e-16c(a) of this title--

(1) may include, in the case of a determination that a violation of subsection (a)(1) or (a)(3) of this section has occurred, such remedies as would be appropriate if awarded under sections 2000e-5(g), 2000e-5(k), and 2000e-16(d) of this title, and such compensatory damages as would be appropriate if awarded under section 1981 or sections 1981a(a) and 1981a(b)(2) of this title;

(2) may include, in the case of a determination that a violation of subsection (a)(2) of this section has occurred, such remedies as would be appropriate if awarded under section 633a(c) of Title 29; and

(3) may not include punitive damages.

- **Federal Rule of Civil Procedure 37.**

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer

with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) ***Specific Motions.***

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) ***Payment of Expenses; Protective Orders.***

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion

is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.*If the motion is granted in part and denied in part, the court may issue any protective

order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) ***Sanctions in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) ***Sanctions in the District Where the Action Is Pending.***

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(2) ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be ge-

nuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

APPENDIX D

For Opinion See: 2007 WL 1774376 2008 WL 2761246 2008 WL 4372641

Court:	U.S. DISTRICT COURT EASTERN DISTRICT OF MICHIGAN (DETROIT)
Case Title:	BROWN ET AL v. VETERANS AFFAIRS, DEPARTMENT OF
Case:	2:04-CV-73411
Judge:	DISTRICT JUDGE JOHN CORBETT O'MEARA
Date Filed:	09/02/2004
Date Closed/ Terminated:	07/15/2008 [Appeal filed, 12/08/2009]
Other Dockets:	UNITED STATES COURT OF APPEALS, 05-01673 UNITED STATES COURT OF APPEALS-SIXTH CIRCUIT 08-02506

CASE INFORMATION

Case Number:	2:04CV7341
Referred To:	MAGISTRATE JUDGE R. STEVEN WHALEN
Jury Demand:	NONE
Demand:	$125,000,000,000.00
Nature of Suit:	TORTS: OTHER PERSONAL INJURY (360)
Key Nature of Suit:	TORTS/NEGLIGENCE; PERSONAL INJURY; OTHER FEDERAL ACTIONS (430.75.25)

Table petitioner wrote and mailed to the Honorable Senators Barbara Mikulski and Paul Sarbanes; and the Assistant Inspector General, LTC Ulysses Miranda, Medical Research and Materiel Command (MRMC), Fort Detrick, on or about June 16, 2003, copied from Exhibit 10 [numbered pages 7-8], Dist. Ct. Dkt. 25:

Table. Symptom-by-symptom comparison of the major symptoms of "Gulf War Syndrome" [GWS] recapitulated in chronically *Leishmania* infected foxhounds.

Chronic Leishmania-Infected Foxhounds	Human Gulf War Syndrome
1. Transient Behavior Abnormality • Atypical transient Shyness • Atypical transient Aggression • Micro-seizures due to micro-stroke events, TIAs (transient ischemic attacks) in the	1. Transient behavior abnormality typically explained as post-traumatic stress disorder. Memory loss-characteristically attributed to post-traumatic stress disorder.

dura matter and choroid plexus could result in transient paralysis (paresis) in limbs-frequently manifest after vigorous exercise.	Similar paresis has been reported for Gulf War Syndrome patients with No medical explanation offered.

See dura mater and choroid plexus powerpoint figures attached. Compare with Leiby, *Washington Post* 30 Dec 2002 [Style Section C, pages 1-2], photo [in original, Exhibit not here] attached [showing brain scan of Gulf War patient with apparent sponge-like holes], page 10. *Leishmania infantum* were isolated from the dura mater and choroids plexus of chronically infected [in nature] dogs (as previously reported also by Garcia-Alonso, et al[.], 1996; Nieto, et al., 1996; Vinuelas, et al., 2001) with pathology [of the brain, described as spongiform encephalopathy] shown/described in the Leiby news article.

2. Chronic fatigue-hypoadrenalism [adrenal insufficiency]due to leishmanial-induced adrenal pathology (Addison's	2. Chronic fatigue syndrome, again most often explained as post-traumatic stress syndrome.

Disease-like symptoms) includes nonresponsiveness to ACTH (test) stimulation; with possible Na^+/K^+ [sodium/potassium] imbalance leading to intermittent heart arythmia with fatigue.	Heart symptoms most often explained as random case events unrelated to Gulf War.

Note: Autoimmune neurologic diseases (e.g. amylotropic lateral sclerosis, ALS, Nicolson et al., 2002) [for leishmaniases] are explained from leakage/vascular permeability of the blood-brain-barrier to leishmanial infectious neurologic cellular debris because of adrenal-cortical malfunction hypoadrenalism[.] (Long and Holaday, 1985)

3. Increased susceptibility/incidence of neoplasia of all tissue types. This is due to cell mediated immunodepression known to accompany chronic visceral	3. Increased incidence of cancer or neoplasia explained based on chemical exposures/ fires/spent uranium used in weapons.

leishmaniasis infection.	
4. Transmission between male-to-female (and vice versa) breeding dogs and to resultant puppies. Causes increased Miscarriage, difficult whelping-stillbirths, difficulty supporting nursing, and puppies born healthy but which show leishmanial symptoms of infection typically between one-two years of age.	4. Transmission between husbands and wives of Gulf War veterans and to their children conceived after the Middle East exposure: some with Gulf War Syndrome symptoms, some with attention deficient disorders (see #1 on left), cancers (#3 on left), stillbirth/miscarriage (#4 on left) at higher rate [than comparable populations].
5. Arthritis, joint swelling[,] musculoskeletal pain.	5. Musculoskeletal pain, arthritis-like symptoms.
6. Ocular bilateral keratoconjunctivitis	6. Ocular/eye symptoms.

and/or uveitis (inflammation of the iris, ciliary body, and choroid) often with ocular oedema/swelling and glaucoma.

Photo showing published canine and human ocular pathology is attached ([in original from] Ferrer, 1999;[and] Napier, 1946, respectively). *See also*[,] the dura matter is contiguous with the eye, photo attached [in original]. (emphasis added)

7. New oral drug already FDA-approved [for other indications] to lower cholesterol, acts to block intracellular nutrients to leishmanial parasites, thereby starving them. This drug has negligible toxicity and [is] orally administered. [New ICBG Grant Research	7. Current anti-leishmanials are too toxic for prophylactic [preventative] use, leishmanial drug resistance is widespread throughout endemic regions worldwide, too toxic to administer except to proven leishmanial infected patients.

Drugs on which
petitioner is author
and the patent's
lead inventor,
Question
Presented II.]

The web page (www.gulfwar.org/Gulf_War/eval.html, 1995) summarized similar findings as a percentage of 1,000 active-duty, reserve and retired gulf war veterans who are experiencing health problems and completed medical evaluation. The diagnoses include: psychological, 26%; musculoskeletal, 16%, gastrointestinal, 7%; respiratory, 6%; nervous system, 6%; skin and subcutaneous, 5%; infectious disease, 4%; endocrine, 3%; genitourinary, 2%; neoplasm, 1%; 15% could not be diagnosed (includes such symptoms as headaches and memory loss, fatigue, sleep disorders and musculoskeletal complaints); and 9% were healthy. The website further notes: "Some veterans have reported their offspring have birth defects or their spouses have health problems which they attribute to the veteran's Persian Gulf service."

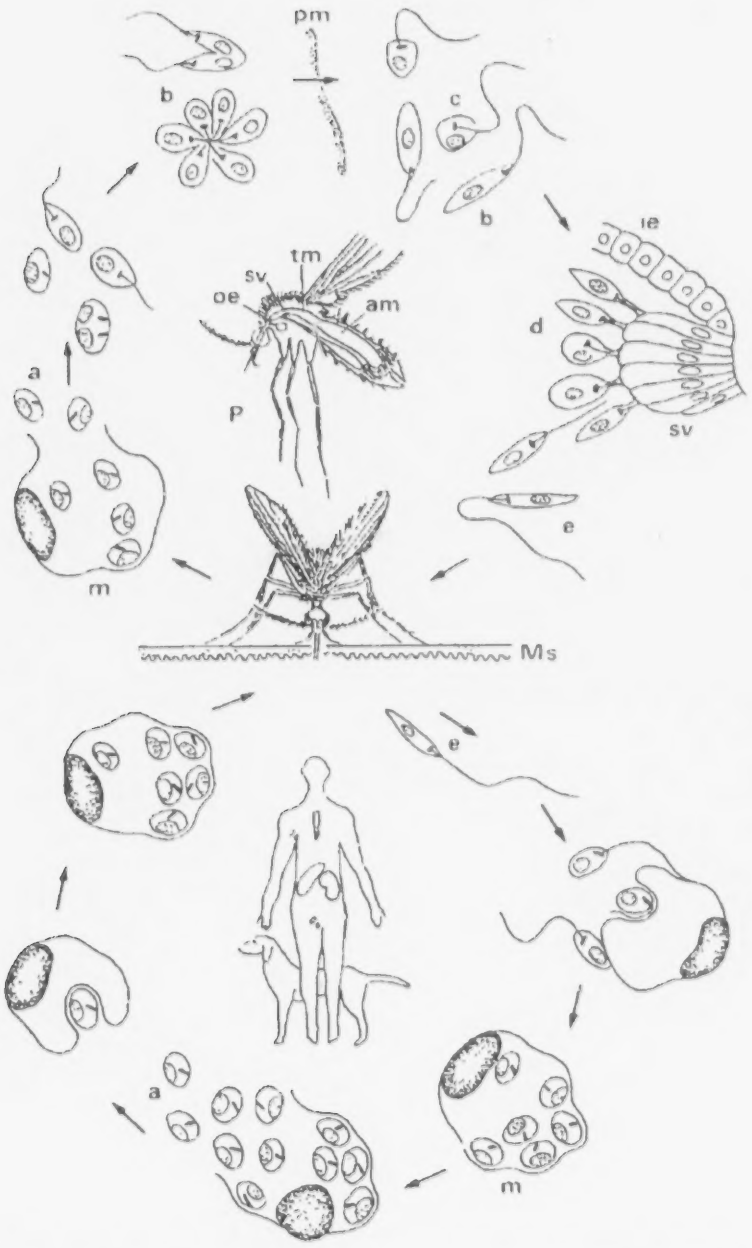

Figure 75.1: Life cycle of the *Leishmania* parasites. P: phlebotomine sandfly, pm: pentrophic membrane, am: abdominal midgut; tm thoracic midgut, oe. oesophagus; sv. stomodeal valve; ie: intestinal epithelium, Ms mammal skin ; m: macrophage. a. amastigotes; b: nectomonad promastigotes; c: paramastigotes; d: attached haptomonads, e: metacyclic promastigotes. (Original drawing by D M Jarry.)

Chapter 75, Leishmaniasis, J.P. Dedet and F. Pratlong, pages 1342, 1343, and 1344.
Manson's Tropical Diseases, Twenty-first Edition, 2003.

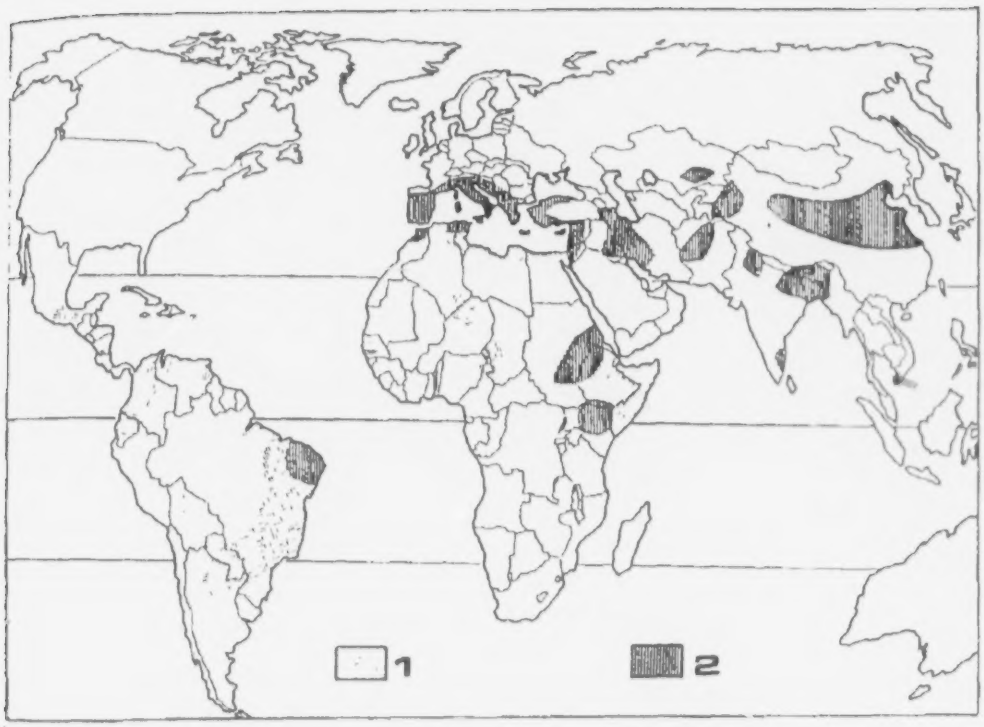

Figure 75.2: Geographical distribution of visceral leishmaniasis 1: Low-endemicity areas 2: High-endemicity areas

Chapter 75, Leishmaniasis, J.P. Dedet and F. Pratlong,
pages 1342, 1343, and 1344.
Manson's Tropical Diseases, Twenty-first Edition, 2003.

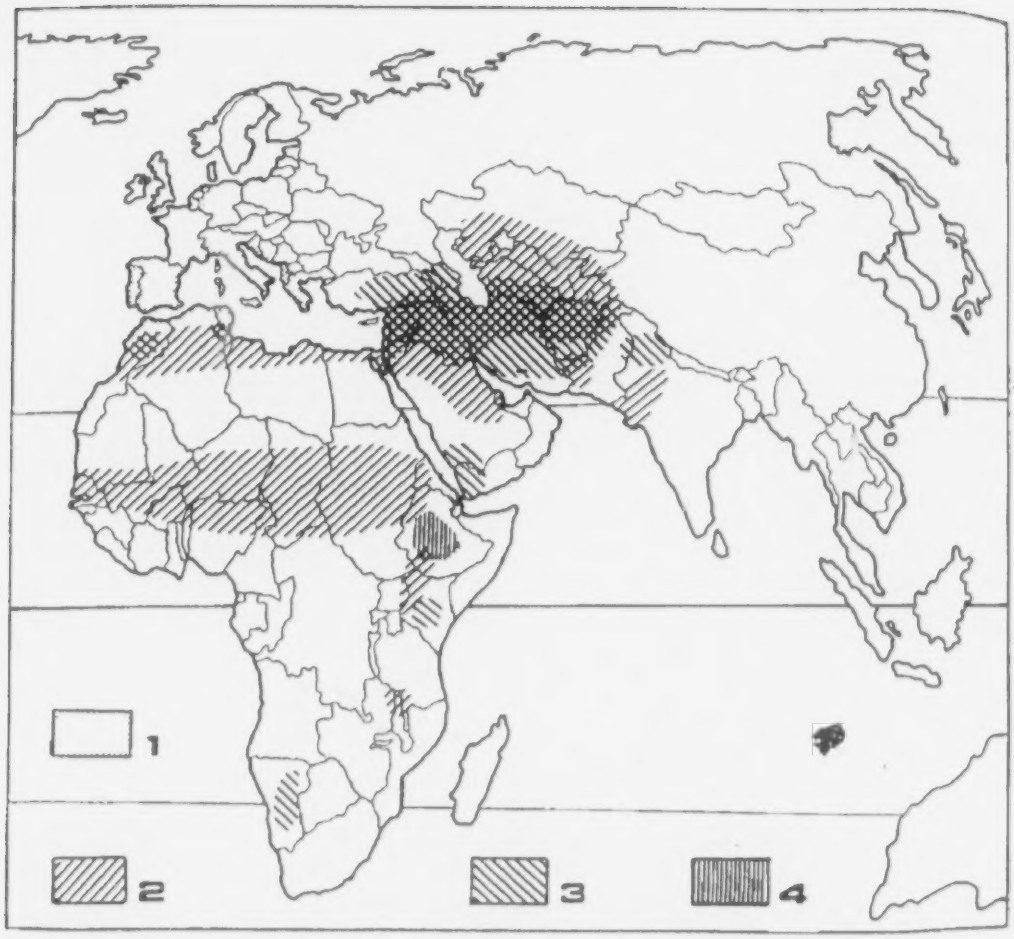

Figure 75.3: Geographical distribution of Old World CL. 1. *L. infantum* CL. 2. Zoonotic CL caused by *L. major*. 3. *L. tropica* CL. 4. *L. aethiopica* CL.

Chapter 75, Leishmaniasis, J.P. Dedet and F. Pratlong,
pages 1342, 1343, and 1344.
Manson's Tropical Diseases, Twenty-first Edition, 2003.

APPENDIX E

REPRESENTATIVE ABSTRACTS OF PRESENTATIONS APPROVED BY THE SCIENTIFIC SOCIETY BY PEER-REVIEW BUT DENIED APPROVAL, UNDER WRITTEN THREAT OF LEGAL PROSECUTION OF PETITIONER BY WRAIR. CDC PRESENTED THE FIRST ABSTRACT ABSENT WRAIR'S PRIOR APPROVAL, GIVEN RETROSPECTIVELY.

EMERGENCE OF CANINE VISCERAL LEISHMANIASIS IN NORTH AMERICA, 2000-2003.

Schantz PM, Steurer F, Duprey Z, Rooney J, Kirchhoff LV, L Rowton E, Jackson J, Gramiccia M. Division of Parasitic Diseases, National Center For Infectious Diseases, Centers For Disease Control and Prevention, Atlanta, GA ; Univ. Iowa, Iowa City IA; Walter Reed Army Institute of Research, Wash. D.C. and Istit. Superiore di Sanita., Rome, Italy.

Visceral leishmaniasis (VL) is a vector borne infection of global importance caused by protozoa of the genus *Leishmania* that infect humans, dogs, and other mammals. VL is endemic in many countries of the world and, until recently, was thought to be an imported disease in North America. Beginning in the late summer of 1999, this infection was identified as the agent causing high morbidity and mortality among Foxhounds in a kennel in New York State. An investigation was initiated to determine the geographic extent, prevalence and modes of

transmission of leishmaniasis in Foxhounds, other canids and associated humans in North America. Serologic testing of over 12,000 foxhounds, other breeds of dogs, and wild canids in 34 states and 4 Canadian provinces was performed; several rounds of testing were offered during three years. *Leishmania* infections detected by serodiagnosis were confirmed whenever possible by culture of the organism. Foxhounds infected with *L. infantum* were identified in 18 states and 2 Canadian Provinces. Possible zoonotic infection of humans associated with infected dogs was assessed by voluntary serologic testing of persons associated with these animals. No clinical or serologic evidence of infection was found in humans associated with infected Foxhounds or in other breeds of dogs and wild canids. *Transmission appears to occur directly from dog to dog, including from pregnant dam to pups, and via blood transfusion. Trypanosoma cruzi*, another potentially zoonotic agent of infection, was also detected in Foxhounds in many states and, because of serologic cross-reactivity, it was necessary to use specific serologic assays to distinguish infections by these two agents. L. infantum MON1, *the agent of visceral leishmaniasis in humans and dogs*, is established and widely distributed in Foxhounds but not in other breeds of dogs or humans in North America. Transmission of the protozoal agent in North America appears limited to direct dog-to-dog mechanisms, however, if the organism becomes adapted for vector transmission by indigenous phlebotomines, the possibility of exposure of humans will be greatly increased. (emphasis added)

Submitted and accepted for presentation at the 53rd Annual Meeting of the American Society of

Tropical Medicine and Hygiene (ASTMH), 7-11 November 2004, Fontainebleau Hilton, Miami Beach, Florida, USA.

Published in *American Journal of Tropical Medicine and Hygiene* (2004) 71(4):44.

CHRONIC VISCERAL LEISHMANIASIS (VL): CELL RECEPTORS AND NEUROLOGIC PATHOLOGY.

Jackson, JE; Iwu MM; Okunji CO; Van Gessel Y; Schantz P; Steurer F; Kollmar E; Topper M; Gramiccia M. Divisions of Experimental Therapeutics and Pathology, Walter Reed Army Institute of Research, Silver Spring, MD; Bioresources Development and Conservation Programme, Silver Spring, MD; Division of Parasitic Diseases, NCID, Centers for Disease Control and Prevention (CDC), Atlanta, GA; Village Animal Hospital, Millbrook, NY; Laboratorio di Parassitologia, Istituto Superiore di Sanita, Rome, Italy.

Chronic leishmaniases have not typically been considered infections having potential neurologic pathology. However, recent and historic, molecular and pathologic reports include: (1) |Leishmania mexicana amazonensis| (|Lma|) synthesize an intracellular adhesion molecule, ICAM-L, having sequence homology with human ICAM-5 (telencephalin, brain unique cell surface protein). ICAM-L facilitates entry into host cells. (2) ICAMs may bind both via homophilic and heterphilic interaction. (3) Human ICAM-5 appears around birth and persists in adult animals/humans. (4) The

CAMs are known to be critical to many inter- and intra- signalling including: the initial axonal growth and guidance; target selection; synapse stabilization and plasticity; myelination and nerve regeneration after injury. (5) Leucocyte adhesion to purified ICAM-5 is temperature dependent, requires Mg\++/ or Mn\++/ and binding is increased by leucocyte stimulation. (6) In 1923 it was reported that VL "is essentially a disease of one tissue of the body. This tissue is the endothelium..." (7) Monocyte recruitment into early lesions depends on endothelial adhesiveness for monocytes and lymphocytes. Our investigative team confirmed prior investigations (>10 published 1925-present) of chronic, natural VL infection in nerve tissues of foxhounds and their progeny. Neurologic symptoms (e.g. behavior: unusual aggression/shyness; seizures; paresis; ocular lesions, etc.) frequently precede both CDC IFA detection threshold and classic VL symptoms. Previously reported VL neurologic pathogenesis includes features typical of other infectious neuropathies: e.g. blood-brain-barrier hyperpermeability, sponge-like reaction accompanied by neuronal degeneration, mobilization of glial cells with accumulation of amyloid deposits, mononuclear keratoconjunctivitis, decreased number of neurons in the hippocampus, diffuse chromatolysis and active neuronophagia in the cerebral cortex. We identified 4 additional cell receptors possibly implicated in leishmanial neurologic pathology. Novel antileishmanial drugs known to inhibit these 4 receptors' functions reduced parasitemia below detection, ameliorating symptoms in two dogs. Possible pathologic and therapeutic implications of these data will be presented.

Submitted and accepted for presentation at the 52nd (Bicentennial) Annual Meeting of the American Society of Tropical Medicine and Hygiene (ASTMH), 3-7 December 2003, Philadelphia Downtown Marriott, Philadelphia, Pennsylvania, USA.

Published in *American Journal of Tropical Medicine and Hygiene* (2003) 69(3):402.

CHRONIC CANINE VISCERAL LEISHMANIASIS (VL): PREPATENT VL NEUROLOGIC MANIFESTATIONS.

Jackson, JE; Iwu MM; Okunji CO; Van Gessel Y; Schantz P; Steurer F; Topper M; Gramiccia M. Divisions of Experimental Therapeutics and Pathology, Walter Reed Army Institute of Research, Silver Spring, MD; Bioresources Development and Conservation Programme, Silver Spring, MD; Division of Parasitic Diseases, NCID, Centers for Disease Control and Prevention (CDC), Atlanta, GA; Laboratorio di Parassitologia, Instituto Superiore di Sanita, Rome, Italy.

Visceral leishmaniasis is known to localize in liver, spleen, bone marrow and lymph nodes. However, at the turn of the century British pathologists in India studying "dum-dum fever" victims reported in chronic VL amastigotes also localized in brain "meninges." In Northern Africa, paralytic symptoms (foot drop) were reported associated with VL and disappeared following pentavalent antimony therapy. Our group investigated a widespread outbreak of canine leishmaniasis across 21 states of the USA and 2 Canadian provinces. The etiologic agent has

been identified as Leishmania (Leishmania) infantum MON1 (Li). This investigation showed canine vertical VL transmission is common in North America. In Germany, human vertical VL transmission has been verified in children born of asymptomatic refugees from VL endemic regions. Recapitulating findings of the early pathologists, we isolated Li in culture from sex organs (males and females), adrenal, dura mater, and choroid plexus from chronic leishmanial infections in dogs, presumptively infected from birth. Frequently, such animals lacked typical leishmanial symptoms (wasting, skin lesions, alopecia, ocular lesions, kidney failure, anemia, epistaxis, arthritic-like swelling joints of limbs), i.e. such symptoms were inapparent, transient (appeared and disappeared without specific treatment), or absent. However, these dogs had positive CDC IFA titers, -histopathology, and/or -biopsy culture for Li infection. Case histories will be presented illustrating chronically VL infected dogs for which initial leishmanial symptoms included only: a) changes in typical behavior, e.g. transient aggression (exercise associated); b) photophobia; c) head sensitivity (aversion to gentle touch); d) brain disfunctions, including paralytic episodes or seizures, noted as "exercise intolerance." In many, it was only at necropsy that Li infection was verified. These cases confounded proper clinical diagnosis because the pathologic manifestations were considered outside the differential for leishmanial infection. Other clinical explanations for these symptoms were excluded based on full necropsy histopathologic findings compatible with leishmanial infection.

Abstract submitted for presentation ASTMH, 10-14 Nov 2002, Denver, Colorado

Published in *American Journal of Tropical Medicine and Hygiene* (2002) 67(2):222-223.

VISCERAL LEISHMANIASIS (VL): EVIDENCE IN DOGS FOR ASSOCIATION WITH CANCERS DUE TO DEPRESSED VL CELLULAR IMMUNITY (CMI).

Jackson, JE; Van Gessell, Y; Schantz P; Steurer, F; Kollmar, E; Gramiccia, M; Scott, P; Breitschwerdt, E; Gaskin, A; Lamothe, J; Topper, M. Divisions of Experimental Therapeutics and Pathology, Walter Reed Army Institute of Research, Silver Spring, MD; Division of Parasitic Diseases, NCID, Centers for Disease Control and Prevention (CDC), Atlanta, GA; Village Animal Hospital, Millbrook, NY; Istituto Superiore di Sanità, Rome, Italy; School of Veterinary Medicine, University of Pennsylvania, Philadelphia, PA; College of Veterinary Medicine, North Carolina State University, Raleigh, NC; Clinique Veterinaire de Carros, Carros, France.

Numerous studies established clinical frequency of VL and CMI depression. However, CMI depression during early asymptomatic infection stages in chronic disease has not been extensively investigated. Asymptomatic human adults and canines infected with Leishmania (Leishmania) infantum are reported to comprise the majority. For several years, our group has been actively investigating a widespread outbreak of endemic canine leishma-

niasis in North America. This investigation included repeated CDC IFA screening of tens of thousands of dogs. In the majority, IFA-positive dogs showed few, if any, overt disease symptoms, at medium to low-range IFA titers, i.e. </=1:128. Data to be presented showed that the leishmanial infection is often vertically transmitted, from parents-to-offspring, in North America. To limit further disease spread/contact, many owners of low-titer IFA-positive dogs' elected either the dogs' euthanasia or donation to scientific institutions for disease investigation. Both CDC and WRAIR have shown that even asymptomatic animals are indeed infected with leishmanial parasites by culture at all IFA titers from 1:16->/=1:512. When such chronic asymptomatic animals' data were correlated from many clinics in the North America and one clinic in a VL endemic region in France, it was evident that there was a much higher cancer rate associated with chronic asymptomatic L. infantum infection than would be anticipated based on the uninfected population of dogs of the same breed. Many cancer:leishmanial hounds in North America were less than 5 years old. Neoplasms were of diverse cellular origin. Leishmanial amastigotes were easily cultured from neoplastic tissue and in some cases leishmanial antigen was detected immunohistochemically within neoplastic cells. Based on these preliminary data, our hypothesis is that even before clinical symptoms are evident, chronically infected dogs experience CMI depression predisposing them to cancer at earlier age and with higher frequency than the parallel non-leishmanial infected population

For presentation at ASTMH, 10-14 Nov 2002 in Denver, Colorado.

Published: American Journal Tropical Medicine and Hygiene (2002) 67(2):223.

NOVEL ORAL THERAPY FOR VISCERAL LEISHMANIASIS (VL): DRUG EFFICACY IN DOGS PROVIDED EVIDENCE FOR A DUAL RECEPTOR BASED MECHANISM-OF-ACTION.

Jackson JE; Iwu MM; Okunji CO; Van Gessel Y; Schantz P; Schuster BG; Steurer F;Topper M; Gramiccia M. Divisions of Experimental Therapeutics and Pathology, Walter Reed Army Institute of Research, Silver Spring, MD; Bioresources Development and Conservation Programme, Silver Spring, MD; Division of Parasitic Diseases, NCID, Centers for Disease Control and Prevention (CDC), Atlanta, GA; Laboratorio di Parassitologia, Instituto Superiore di Sanita, Rome Italy.

Visceral leishmaniasis is known to localize in liver, spleen, bone marrow and lymph nodes. However, at the turn of the century British pathologists in India reported in chronic VL (fatal human cases) amastigotes also populated such diverse tissues as kidney, brain, etc.. Our group has investigated an outbreak of canine leishmaniasis across 21 states of the USA and 2 provinces in Canada. Evidence from this North American investigation is that vertical leishmanial transmission from either the sire or dam to the resultant puppies is common. Repeating work of the British pathologists, we investigated and treated chronic leishmanial infections

in dogs, presumptively infected from birth. In these animals, besides liver, bone marrow, spleen and lymph nodes, amastigotes are routinely isolated from sex organs (males and females), adrenal, and dura mater, using "gold standard" biopsy culture. One factor these diverse tissues share is a high number of low-density lipoprotein (LDL) receptors. *Leishmania* require, but can not synthesize, cholesterol. *Leishmania* do synthesize ergosterol, a sterol shared with fungi, but not, with humans. Our hypothesis was that treating infected dogs with a HMGCo-A reductase inhibitor (FDA-approved to lower cholesterol), would reduce host provided cholesterol as well as block leishmanial ergosterol synthesis, thereby, reducing parasite numbers. In a preliminary trial using naturally *Leishmania (Leishmania) infantum* (Li) infected North American dogs, our hypothesis was supported. Further, we will present evidence that these drugs work better than anticipated to eliminate parasites from chronically infected dogs because the HMGCo-A reductase inhibitor actually inhibits both the LDL- and a second receptor's functions essential to Li parasites' survival within mammalian host cells. It is the inhibition of two receptors' functions which allows this widely used oral antihyperlipidemic drug, Mevacor® (lovastatin), effectively to suppress this viscero-cutaneous leishmanial infection in the dogs. We will also present preliminary data on prophylactic activity of Mevacor® in this canine model.

Abstract submitted for presentation ASTMH, 10-14 Nov 2002, Denver, Colorado

Published in *American Journal of Tropical Medicine and Hygiene* (2002) 67(2):287-288.

APPENDIX F

(i) Twenty (20) Peer-reviewed Science Journal Publications Reporting Leishmanial Infections of the Central Nervous System: Brain (Including the Dura Mater [tough outer membrane of brain] and Choroid Plexus [capillary blood network continuous between brain and retina or eyes], Spinal Column, and Peripheral Nerves of Humans, Monkeys, Dogs and Rodents.

(ii) Three (3) Representative Peer-reviewed Science Journal Publications Reporting 40 Years or More *Leishmania* Infection Asymptomatic Latency.

(i) Abreu-Silva AL, Calabrese KS, Tedesco RC, Mortara RA, Goncalves da Costa SC, 2003. Central nervous system involvement in experimental infection with *Leishmania (Leishmania) amazonensis*. *Am J Trop Med Hyg* 68(6):661-665.

Avtsyn AP, Berezina EK, Kenig EE, Dursunova SM, Belova EM, Shetegelman LA, Zhukov VG, 1971. [Experimental model of leishmaniasis meningoencephalitis.] [Article in Russian.] *Antibiotiki* 16(10):885-888.

Beaver PC, Jung RC, Cupp EW, 1984. Clinical Parasitology, ninth edition, Lea and Febiger, Philadelphia, pp. 55-77.

Carswell J, 1953. Kala-azar at Kitui. *East African Medical Journal* 30:287-293.

Garcia-Alonso M, Nieto CG, Blanco A, Requena JM, Alsonso C, Navarrete I, 1996. Presence of antibodies in the aqueous humor and cerebrospinal fluid during *Leishmania* infections in dogs. Pathologic features at the central nervous system. *Parasite Immunol* 18(11):539-546.

Hashim FA, Ahmed AE, El Hassan M, El Mubarak MH, Yagi H, Ibrahim EN, Ali MS, 1995. Neurologic changes in visceral leishmaniasis. *Am J Trop Med Hyg* 52(2):149-154.

Kubba R, El Hassan AM, Al-Gindan Y, Omer AH, Kutty ML, Saeed MB, 1987. Peripheral nerve involvement in cutaneous leishmaniasis (Old World). *Int J Dermatol* 26(8):527-531.

Meleney HE, 1925. The histopathology of kala-azar in the hamster, monkey and man. *Am J Pathol* 1:147-168.

Foglia Manzillo F, Papacone R, Cappiello S, De Santo R, Bianciardi P, Oliva G. 2009 Resolution of tongue lesions caused by *Leishmania infantum* in a dog treated with the association miltefosine-allopurinol. *Parasit Vectors* 26(2 Suppl) 1:S6.

Garin YJ, Sulahian A, Meneceur P, Pratlong F, Prina E, Gangneux J, Dedet JP, Derouin F. 2001. Experimental pathogenicity of a presumed monoxenous trypanosomatid isolated from humans in a murine model. *J Eukaryot Microbiol* 48(2):170-176.

Melo GD, Marcondes M, Vasconcelos RO, Machado GF. 2009. Leucocyte entry into the CNS of *Leishmania chagasi* naturally infected dogs. *Vet Parasitol* 162(3-4):248-256.

Mustafa D, 1965. Neurologic disturbances in visceral leishmaniasis. *J Trop Med Hyg* 68:248-250.

Nicolau S, Perard CH, 1936. Etude histo-physiopathologique de l'oeil et du systeme nerveux dans la leishmaniose generalisee du chien. *Ann Inst Pasteur* 57(5):463-486.

Nieto CG, Vinuelas J, Blanco A, Garcia-Alonso M, Verdugo SG, Navarrete I. 1996. Detection of *Leishmania infantum* amastigotes in the canine choroid plexus. *Vet Rec* 139(14):346-347.

Prasad LSN, Sen S, 1996. Migration of *Leishmania donovani* amastigotes in the cerebrospinal fluid. *Am J Trop Med Hyg* 55(6):652-654.

Satti MB, El Hassan AM, Al-Gindan Y, Osman MA, Al-Sohaibani MO, 1989. Peripheral neural involvement in cutaneous leishmaniasis: a pathological study of human and experimental animal lesions. *Int J Dermatol* 28(4):243-247.

Shortt HE, 1923. The pathology of acute experimental kala-azar in monkeys. *Indian J Med Research* 11:186-195.

Tafuri WL, Santos RL, Arantes RM, Concalves R, de Melo MN, Michalick MS, Tafuri WL.

2004. An alternative immunochemical method for detecting *Leishmania* amastigotes in paraffin-embedded canine tissues. *J Immunol Methods* 292(1-2):17-23.

Thorson RE, Bailey WS, Hoerlein BF, Seibold HR, 1955. A case of imported visceral leishmaniasis of a dog in the United States. *Am J Trop Med Hyg* 4:18-22.

Vinuelas J, Garcia-Alonso M, Ferrando L, Navarrete I, Molano I, Miron C, Carcelen J, Alonso C, Nieto CG, 2001. Meningeal leishmaniosis induced by *Leishmania infantum* in naturally infected dogs. *Vet Parasitol* 101(1):23-27.

(ii) Czechowicz RT, Millard TP, Smith HR, Ashton RE, Lucas SS, Hay RJ, 1999. Reactivation of cutaneous leishmaniasis after surgery. *Br J Dermatol* 141(6):1113-1116. ["We describe an 85 year old man who developed CL on his face after recent cutaneous surgery in that site. This case is also unusual because the most likely source of exposure to the infection occurred over 50 years previously."]

Guilland V, Hill MP, Piens MA, Barrut D, Moullin G, 1991. [Cutaneous leishmaniasis with 48 years development.] [Article in French] *Ann Dermatol Venereol* 118(11):850-851.

Jewell AP, Giles FJ, 1996. Cutaneous manifestation of leishmaniasis 40 years after exposure in a patient with chronic lymphocytic leukaemia. *Leuk Lymphoma* 21(3-4):347-349.

APPENDIX G

Thirty-seven (37) Peer-reviewed Science Journal Publications Reporting Leishmanial Congenital Transmission (Parent-to-Offspring) and Sexual/Genital Infection in Humans/Dogs.

[Note: Kala azar, or black fever, is visceral leishmaniasis.]

Sexual/Genital Infection:

Castro Coto A, Hidalgo Hidalgo H, Solano Aguilar E, Coto Chacon F, 1987. [Leishmaniasis of the genital organs.][Article in Spanish] *Med Cut Ibero Lat Am* 15(2):145-150. [5 human farmers]

Symmers WSC, 1960. Leishmaniasis acquired by contagion: a case of marital infection in Britain. *Lancet* 1:127-132.

Quinnel RJ, Courtenay O, 2009. Transmission, reservoir hosts and control of zoonotic visceral leishmaniasis. *Parasitology* 136(14):1915-1934.

Rosypal AC, Lindsay DS, 2005. Non-sandfly transmission of a North American isolate of *Leishmania infantum* in experimentally infected Balb/c mice. *J Parasitol* 91(5):1113-1115. [both sexual and congenital leishmanial transmission shown in laboratory mice]

Congenital, Parent-to-Offspring Infection:

Banerji D. 1955. Possible congenital infection of kala-azar. J Indian Med Assoc. 24(11):433-435.

Bialek R, Knobloch J. 1999. Parasitic infections in pregnancy and congenital protozoan infections. Part I.: Protozoan infections]. [Article in German] Z Geburtshilfe Neonatol 203(2):55-62.

Blanc C, Robert A. 1984. [5th case of congenital kala-azar][Article in French] Presse Med. 13(28):1751.

Bogdan C, Schonian G, Banuls AL, Hide M, Pratlong F, Lorenz E, Rollinghoff M, Mertens R. 2001. Visceral leishmaniasis in a German child who had never entered a known endemic area: case report and review of the literature. Clin Infect Dis 32(2):302-306.

Castel Y, Chastel C, Le Moigne C, Simitzis AM, Le Fur JM. 1982. [Autochthonous kala-azar (author's transl)][Article in French] Arch Fr Pediatr. 39(2):97-98.

Couvreur J, Desmonts G. 1977. [Parasitic pathology of the fetus] [Article in French] Rev Prat 27(11):647-8, 653-658.

De Raadt P. 1985. [Congenital trypanosomiasis and leishmaniasis] [Article in French] Arch Fr Pediatr. 42 Suppl 2:925-927.

Diaz-Espineira MM, Slappendel RJ, 1997. A case of autochthonous canine leishmaniasis in the Netherlands. *Vet Q* 19(2):69-71.

Dubey JP, Rosypal AC, Pierce V, Scheinberg SN, Lindsay DS. 2005. Placentitis associated with leishmaniasis in a dog. J. Am. Vet. Med. Assoc. 227:12661269.

Elamin A, Omer MI. 1992. Visceral leishmaniasis in a 6-week-old infant: possible congenital transmission. Trop Doct. 22(3):133-135.

Eltoum IA, Zijlstra EE, Ali MS, Ghalib HW, Satti MM, Eltoum B, el-Hassan AM. 1992. Congenital kala-azar and leishmaniasis in the placenta. Am J Trop Med Hyg 46(1):57-62.

Figueiro-Filho EA, Duarte G, El-Beitune P, Quintana SM, Maia TL. 2004. Visceral leishmaniasis (kala-azar) and pregnancy. Infect Dis Obstet Gynecol 12(1):31-40.

Gaskin AA, Schantz P, Jackson J, Birkenheuer A, Tomlinson L, Gramiccia M, Levy M, Steurer F, Kollmar E, Hegarty BC, Ahn A, Breitschwerdt EB. 2002. Visceral leishmaniasis in a New York foxhound kennel. J Vet Intern Med. 16(1):34-44.

Gibson-Corley KN, Hostetter JM, Hostetter SJ, Mullin K, Ramer-Tait AE, Boggiatto PM, Petersen CA. 2008. Disseminated Leishmania infantum infection in two sibling foxhounds due to possible vertical transmission. Clin. Vet. J. 49:1005-1008.

Grech V, Vella C, Parascandolo R. 2000. Successful treatment of visceral leishmaniasis in Finnish-type congenital nephrotic syndrome. Pediatr Nephrol 14(5):410-411.

Kaplanski G, Farnarier C, Durand JM, Soubeyrand J, Bongrand P, Kaplanski S. 1991. Leishmaniasis acquired in Belgium. Lancet. 338(8771):885.

Loke YW. 1982. Transmission of parasites across the placenta. Adv Parasitol. 21:155-228.

Mandanti F, Sozzi S. 1995. Isolation of *Leishmania* from a newborn puppy. Trans. R. Soc. Trop. Med. Hyg. 89(4): 402.

Meinecke CK, Schottelius J, Oskam L, Fleischer B. 1999. Congenital transmission of visceral leishmaniasis (Kala Azar) from an asymptomatic mother to her child. Pediatrics 104(5):e65.

Masucci M., De Majo M, Contarino RB, Borruto G, Vitale F, Pennisi MG, 2003. Canine leishmaniasis in the newborn puppy. Vet. Res. Commun. 27 Suppl. 1: 771-774.

Mittal V, Sehgal S, Yadav TP, Singh VK. 1987. Congenital transmission of kala-azar. J Commun Dis. 19(2):184-185.

Nyakundi PM, Muigai R, Were JB, *Oster CN, Gachihi GS, Kirigi G. 1988. Congenital visceral leishmaniasis: case report. Trans R Soc Trop Med Hyg. 82(4):564.

*Charles N. Oster, MD, was Director, Infectious Diseases Division, Walter Reed Army Medical Center, Washington, D.C.

Pagliano P, Carannante N, Rossi M, Gramiccia M, Gradoni L, Faella FS, Gaeta GB. 2005. Visceral leishmaniasis in pregnancy: a case series and a systematic review of the literature. J Antimicrob Chemother 55(2):229-233.

Pangrazio KK, Costa EA, Amarilla SP, Cino AG, Silva TMA, Costa LF, Dengues EG, Ruiz Diaz AA, Santos RL. 2009. Tissue distribution of Leishmania chagasi and lesions in transplacentally infected fetuses from symptomatic and asymptomatic naturally infected bitches. Vet. Parasitol. 165(3-4):327-331.

Petersen CA. 2009. New means of canine leishmaniasis transmission in North America: the possibility of transmission to humans still unknown. Interdisciplinary Perspective on Infectious Diseases 2009, Art. ID 802712, 5 pages.

Quinn HE, Ellis JT, Smith NC. 2002. Neospora caninum: a cause of immune-mediated failure of pregnancy? Trends Parasitol 18(9):391-394.

Rab MA, Mahmood MT, Bux D, Hassan M, Hassan K. 1991. Visceral leishmaniasis in a six month old child: is congenital transmission of disease possible? J Pak Med Assoc. 41(8):191-193.

Rosypal AC, Troy GC, Zajac AM, Frank G, Lindsay DS. 2005. Transpacental transmission of a North American isolate of *Leishmania infantum* in an experimentally infected Beagle. J. Parasitol. 91(4):970-972.

Schantz PM, Jackson J, Steurer F, Rooney J, Breitschswerdt E, Barr SC. 2001. Evidence for direct dog-to-dog transmission of visceral leishmaniaisis in the United States. *J Am Soc Trop Med Hyg* 65(3):421-422.

Schantz PM, Steurer F, Duprey Z, Rooney J, Kirchhoff LV, L Rowton E, Jackson J, Gramiccia M, 2004. Emergence of canine visceral leishmaniasis in North America, 2000-2003. *Am J Trop Med Hyg* 71(4):44. [Copy in Appendix E.]

Sharma R, Bahl L, Goel A, Upadhaya A, Kaushik SL, Sharma RL, Gupta A. 1996. Congenital kala-azar: a case report. J Commun Dis 28(1):59-61.

Sheikha A. 2004. Dyserythropoiesis in 105 patients with visceral leishmaniasis. Lab Hematol 10(4):206-211.

Yadav TP, Gupta H, Satteya U, Kumar R, Mittal V. 1989. Congenital kala-azar. Ann Trop Med Parasitol. 83(5):535-537.

APPENDIX H

Fifty-three (53) Peer-reviewed Science Journal Articles Reporting Neoplasms/Cancer: *Leishmania* Association

Akcali C, Baba M, Inaloz S, Seckin D, Uzun S. 2008. Cutaneous leishmaniasis mimicking squamous cell carcinoma. *Ann Acad Med* 37(5):435-436.

Albanese F, Poli A, Millanta F, Abramo F. 2002. Primary cutanbeous extragenital canine transmissible venereal tumor with *Leishmania*-laden neoplastic cells: a further suggestion of histiocytic origin? *Vet Dermatol* 13(5):243-246.

Bialek R. 2005. [Parasitic diseases in pediatric cancer patients][Article in German] *Klin Padiatr* 217(Suppl 1):S85-S90.

Boer A, Blodorn-Schlicht N, Wiebels D, Steinkraus V, Falk TM. 2006. Unusual histopathological features of cutaneous leishmaniasis identified by polymerase chain reaction specific for *Leishmania* on paraffin-embedded skin biopsies. *Br J Dermatol* 155(4):815-819.

[Differential diagnosis includes malignant epithelial neoplasms, lymphoma...]

Boutros N, Hawkins D, Nelson M, Lampert IA, Naresh KN. 2006. Burkitt lymphoma and leishmanisis in the same tissue sample in an AIDS patient. *Histopathology* 48(7):880-881.

Brandonisio O, Fumarola L, Spinelli R, Gradoni L. 2002. Unusual presentation of leishmaniasis as an adrenal cystic mass. *Eur J Clin Microbiol Infect Dis* 21(9):682-683.

Brenner DS, Jacobs SC, Drachenberg CB, Papadimitriou JC, 2000. Isolated visceral leishmaniasis presenting as an adrenal cyst. *Arch Pathol Lab Med* 124(10):1553-1556.

Casado JL, Cuesta C, Sanchez JA, Guerrero A, 1998. Solitary pulmonary nodule due to *Leishmania* in a patient with AIDS. *Clin Inf Dis* 26(2):532-534.

Casolari C, Guaraldi G, Pecorari M, Tamassia G, Cappi C, Fabio G, Cesinaro AM, Piolini R, Rumpianesi F, Presutti L. 2005. A rare case of localized mucosal leishmaniasis due to *Leishmania infantum* in an immunocompetent Italian host. *Eur J Epidemiol* 20(6):559-561. [laryngeal tumor]

Castellano VM, Rodriguez-Peralto JL, Alonso S, Gomez-De la Fuente E, Ibarrola C, 1999. Dermatofibroma parasitized by *Leishmania* in HIV infection: a new morphologic expression of dermal kala azar in an immunodepressed patient. *J Cutan Pathol* 26(10):516-519.

Castro Coto A, Hidalgo Hidalgo H, Solano Aguilar E, Coto Chacon F, 1987. [Leishmaniasis of the genital organs.][Article in Spanish] *Med Cut Ibero Lat Am* 15(2):145-150. [5 human farmers]

Catone G, Marino G, Poglayen G, Gramiccia M, Ludovisi A, Zanghi A. 2003. Canine transmissible venereal tumor parasitized by *Leishmania infantum*. *Vet Res Commun* 27(7):549-553.

Dereure J, Duong Thanh H, Lavabre-Bertrand T, Cartron G, Bastides F, Richard-Lenoble D, Dedet JP. 2003. Visceral leishmaniasis. Persistence of parasites in lymph nodes after clinical cure. *J Infect* 47(1):77-81. [drug treatment for leishmaniasis but with lymphoma]

Eholie SP, Tanon AK, Folquet-Amorissani M, Doukoure B, Adoubryn KD, Yattara A, Bissagnene E. 2008. [Three new cases of visceral leishmaniasis in Cote d'Ivoire][Article in French] *Bull Soc Pathol Exot* 101(1):60-61. [Note two patients had chronic lymphoid leukaemia or Burkitt lymphoma.]

Fakhar M, Asgari Q, Motazedian MH, Monabati A. 2008. Mediterranean visceral leishmaniasis associated with lymphoblastic leukemia (ALL). *Parasitol Res* 103(2):473-475.

Fiorini M, Messina MF, Barracchia A, 2002. Peripheral intramonocytotic and intraneutrophil leishmaniasis observed in a chronic myelomonocytic leukemia (CMMoL) patient. *Haematologica* 87(8):EIM21.

Friedman R, Hanson S, Goldberg LH, 2003. Squamous cell carcinoma arising in a *Leishmania* scar. *Dermatol Surg* 29(11):1148-1149.

Gonzalez-Beato MJ, Moyano B, Sanchez C, Gonzalez-Beato MT, Perez-Molina JA, Miralles P, Lazaro P, 2000. Kaposi's sarcoma-like lesions and other nodules as cutaneous involvement in AIDS-related visceral leishmanasis. *Br J Dermatol* 143(6):1316-1318.

Grevot A, Jaussaud Hugues P, Marty P, Pratlong F, Ozon C, Haas P, Breton C, Bourdoiseau G, 2005. Leishmaniosis due to *Leishmania infantum* in a FIV and FelV positive cat with squamous cell carcinoma diagnosed with histological, serological and isoenzymatic methods. *Parasite* 12(3):271-275.

Kamel AH, 1945. Lymphoblastic reticulosarcoma of the orbit. *Bull Ophthalmol Soc Egypt* 38:47-49.

Hagenah GC, Wundisch T, Eckstein E, Zimmermann S, Holst F, Grimm W, Neubauer A, Lohoff M. 2007. [Sepsis-like disease in an immunocompromised patient with a travel history to Mallorca] [Article in German] *Internist (Berl)* 48(7):727-730. [immunoblastic B-cell lymphoma in intestine]

Kawakami A, Fukunaga T, Usui M, Asaoka H, Noda M, Nakajima T, Hashimoto Y, Tanaka A, Kishi Y, Numano F. 1996. Visceral leishmaniasis misdiagnosed as malignant lymphoma. *Internal Med* 35(6): 502-506.

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APPENDIX I

Ninety (90) Peer Reviewed Science Journal Articles Reporting Ocular Pathology in Leishmanial Infections of Humans And Dogs.

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